

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-1495

To be argued by Michael E. Moore

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

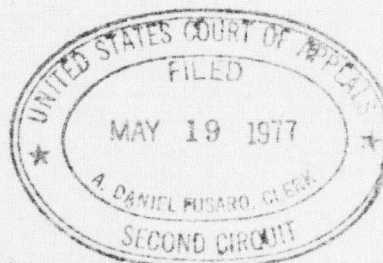
v.

EUGENE SCAFIDI, BARIO MASCITTI,
ANTHONY DI MATTEO, SAVERIO CARRARA,
MICHAEL DELUCA, JAMES NAPOLI, JR.,
JAMES V. NAPOLI, SR., ROBERT VOULO
and SABATO VIGORITO,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES



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Appellee

v.

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Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

QUESTIONS PRESENTED

1. Whether the district court properly denied appellants' motions to suppress evidence gathered from electronic surveillance.

A. Whether appellants have standing to challenge the assertedly illegal entries of private premises necessary to conduct the surveillance and; if they do, whether those entries were lawful.

B. Whether the government violated various provisions of Title III.

(1) Whether there was probable cause to issue the orders.

(2) Whether the affidavit in support of one of the orders established the inadequacy of conventional investigative techniques.

- (3) Whether the government complied with Title III's sealing requirement.
- (4) Whether the government's failure to file timely progress reports on every occasion required suppression.
- (5) Whether the government's asserted failure to comply with Title III's naming requirement warrants suppression.
- (6) Whether the failure to serve appellant DiMatteo with timely inventory notice required suppression of his conversations.
- (7) Whether electronic surveillance at one of the locations involved was conducted at the times specified in the authorizing order.

2. Whether the evidence was sufficient to support the convictions of appellants Scafidi and Carrara.

3. Whether Count 4 of the indictment was legally sufficient.

4. Whether appellants were prejudiced by the denial of their mid-trial motions for severance.

5. Whether it was an abuse of discretion for the trial court to substitute an alternate juror for a persistently tardy juror.

6. Whether appellant Carrara's miscellaneous claims warrant reversal of his conviction.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York (Mishler, C.J. presiding), appellants Scafidi and Voulo were convicted of conducting an illegal gambling business from March 1972 to July 1972 (the 967 East Second Street Count), and appellants Napoli, Sr., Napoli,

Jr., DeLuca, Vigorito, Carrara, Mascitti, and DiMatteo were convicted of conducting an illegal gambling business from April 1973 to June 1973 (The Hiway Lounge Count), all in violation of 18 U.S.C. 1955.^{1/} Appellants were sentenced as follows:

Napoli, Sr. -- five years' imprisonment
and a \$20,000 fine;

Napoli, Jr. -- three years' imprisonment
and a \$20,000 fine;

DeLuca -- six months' imprisonment, 30
months' probation and a \$10,000 fine;

Vigorito -- six months' imprisonment,
30 months' probation and a \$20,000
fine;

Carrara -- four months' imprisonment,
32 months' probation and a \$5,000
fine;

Mascitti -- two months' imprisonment
and 34 months' probation;

DiMatteo -- three years' probation;

Voulo -- two months' imprisonment and
34 months' probation;

Scafidi -- two months' imprisonment and
34 months' probation.

^{1/} The superceding indictment upon which appellants were tried consisted of four counts, which we designate as the "967 East Second Street Count" (Count Two); the "Apartment 309" Count (Count Three); the "Hiway Lounge Count" (Count Four) and the "Conspiracy Count" (Count Seven). Appellant Voulo was charged in the Hiway Lounge Count but was acquitted. Appellants Voulo, Scafidi, DiMatteo and Mascitti were found guilty on the Apartment 309 Count but that Count was dismissed after the trial (see pp. 6-7, infra). The Conspiracy Count was dismissed as to all appellants at the close of the government's case (see pp. 77-80, infra).

1. The evidence at trial

- a. Overview

The government's evidence showed the existence of a large-scale numbers lottery operating in Brooklyn, New York, during three discrete periods of time: the spring of 1972, involving appellants Scafidi and Voulo as well as others unknown; the winter of 1972-1973, involving appellants Scafidi, Voulo, DiMatteo, and Mascitti; and the spring of 1973, involving appellants Carrara, DeLuca, DiMatteo, Mascitti, Napoli, Sr., Napoli, Jr., and Vigorito. All three policy businesses shared a common organizational structure.

At the bottom level of the daily operation, "runners" (also called "collectors" or "writers") took numbers bets from regular customers. These bets were recorded on slips of paper which were typically collected by a pickup man directly from the runner or from the runner's "drop" or hiding place. After collecting bundles of the various runners' envelopes stuffed with slips, the pickup man delivered them to his "controller". The controllers' daily bundles were in turn transferred to policy "banks", where each day's "hits", or winning numbers, were determined for each of the controllers' runners. At the bank, daily profits were calculated for each controller, his runners, and the operation as a whole after the hits were deducted from the total. These figures were listed on adding machine tapes or "ribbons".

At the next level, an "accounting office" existed which collated the records of daily betting activity submitted to it from several banks. In the Brooklyn numbers operations, there

were two winning numbers announced daily, each containing three digits and derived from the pari-mutual results at various New York racetracks.

Most of the evidence consisted either of gambling records or of tape recordings of appellants' conversations, all seized with prior judicial approval. Since the structure and vernacular of a numbers enterprise is unfamiliar to laymen, the significance of much of the evidence was interpreted for the jury by an FBI expert, Agent Richard Harker.

b. The 967 East Second Street Count

On May 1, 1972, FBI agents conducted a warrant-authorized search of a residence located at 967 East Second Street in Brooklyn. There they found appellant Voulo, Joseph Mustacchio, and "Buddy" Griffin in a basement room operating what appeared to be a policy "bank". The agents seized several adding machines and calculators as well as numerous folders containing policy "ribbons", daily and weekly master sheets, and miscellaneous betting slips (G.Exh. 62-68; T. 415-419). Voulo's fingerprints were found on some of the folders. FBI analysis of a master sheet dated April 29, 1972 indicated that the "bank" had processed approximately \$34,000 worth of bets that day (T. 5110).

Visual surveillance of 967 East Second Street prior to the search established that Voulo, Griffin, and Mustacchio, as well as appellant Scafidi, had been working at the residence for at least one month. The pattern of Scafidi's activities in and around the residence indicated that he picked up the "ribbons" at the "bank" each night so that they could be delivered to the

"controllers" in the field, who, in turn, used them to service their betting customers (T. 529-530; 1161-1164; 1841-1844; 1871; 1975-1982).

Many of the "ribbons" and "master sheets" found at 967 East Second Street bore the same account designations (reflecting the "controllers" who brought each day's "work" to the "bank") as records seized pursuant to a warrant on June 16, 1971 from an apartment at 405 Elder Lane in Brooklyn (Tr. 5228-5229).

On the second floor of the premises, the officer conducting that search discovered appellants Scafidi and Voulo standing by a table in a small room. On the table, the officer found and seized betting slips and lottery records, adding machines and calculators, and more than \$2,000 in cash (Tr. 4408-4429).

c. The Apartment 309 Count

The Apartment 309 Count charged five persons -- Anthony DiMatteo, Barrio Mascitti, Eugene Scafidi, Robert Voulo, and Rocco Riccardi -- with conducting an illegal gambling operation from December 1972 until March 1973. Most of the evidence adduced on this count consisted of tape recordings of the defendants' own conversations made pursuant to court-ordered electronic surveillance. The oral communications seized from the apartment showed that appellants DiMatteo and Mascitti were "bank" workers in a massive policy operation in Brooklyn (T. 5281-5286) and referred to Jimmy V. "Jimmy Nap" Napoli, Sr. as the "boss" (T. 3246-3250; G.Exh. 98). The electronic surveillance at Apartment 309 further disclosed that Mascitti often discussed gambling matters over the telephone with Eugene

"Bo" Scafidi, and court-ordered pen register monitoring of the calls made from the apartment during the period of the electronic surveillance confirmed that Mascitti or DiMatteo called Scafidi's residence at least once a day. Court-ordered wire surveillance of the telephone located at Scafidi's house during February and March 1973 revealed that Scafidi operated a lottery "accounting office" there (T. 2723-2734; 2659-2675; 2687-2690; G.Exh. 258-A, 206-A).

The jury returned guilty verdicts against Scafidi, Voulo, Mascitti, and DiMatteo on this count but acquitted Riccardi. Since the jury did not find that the operation described in the Apartment 309 Count involved five or more persons as required by 18 U.S.C. 1955, the court dismissed the count after trial.

d. The Hiway Lounge Count

Court-ordered electronic surveillance at the Hiway Lounge, located at 362 Metropolitan Avenue in Brooklyn, showed that a massive numbers game, taking in tens of thousands of dollars worth of bets daily, was headquartered there. James V. Napoli, Sr. was the central figure in the scheme, directing the activities of subordinate accountants, bank workers, controllers, and runners on a daily basis (Tr. 5286-5316). The intercepted conversations disclosed that James Napoli, Jr. also participated in the management of the lottery and may have acted as a "controller" as well (Id.). The conversation between the Napolis and appellant Vigorito indicated that Vigorito was a "controller" for the operation and that he consulted with the Napolis on daily lottery management problems (T. 3936-3944; G. Exh. 275A; T. 5302). Appellant DeLuca's conversations indicated that he worked in the lottery accounting office (T. 5486-5487;

5502-5517; G.Exh. 273-A). The conversations of appellants Mascitti and DiMatteo intercepted at the Lounge showed that they worked as "bankers" for the lottery, as they had during the period covered by the Apartment 309 count (T. 5463-5464; 5479-5517; G.Exh. 273-A; 5276-5278). Conversations between Napoli, Sr. and appellant Carrara seized on May 4 and May 16 indicated that Carrara was at least a major "controller" in the organization and, in addition, participated in the payment of protection money to local police (Tr. 4802; 4804-4806; 4825-4835; G.Exh. 224-A; T. 3988-3990; G.Exh. 101-A; See T. 3785-3786; G.Exh. 100A).

2. The conduct of the electronic surveillance

As we have detailed above, the bulk of the government's evidence on the Apartment 309 and Hiway Lounge Counts consisted of incriminating conversations between these appellants intercepted pursuant to several court orders.

A series of three court orders authorized the interceptions at Apartment 309 (hereinafter orders 309 I, 309 II, 309 III). The first order in the series -- 309 I -- was issued by Judge Orrin G. Judd on December 8, 1972 and authorized the interception of oral communications for 15 days at Apartment 309. Order 309 I named appellants DiMatteo, Mascitti, and Scafidi, as well as Joseph Mustacchio and "others as yet unknown", as the targets of the interceptions (J.A. I 237). Order 309 II was issued by Judge Jack B. Weinstein on January 15, 1973, and, like 309 I, permitted interception of oral communications for a period of 15 days only at the apartment. That order named as targets appellants DiMatteo

and Mascitti, Joseph Simonelli, Phyllis Engert (the tenant) and "others as yet unknown" (Supp. App. to Brief for DiMatteo at 17). The third and final order in the series -- 309 III -- was issued by Judge George Rosling on February 20, 1973, and authorized seizure of wire communications for a period of 15 days over two telephones, one located at Apartment 309 and the other located at appellant Scafidi's residence at 161-20, 91st Street, Howard Beach, Queens. Appellants Mascitti, DiMatteo, Scafidi, and Voulo, Rocco Riccardi, Joseph Simonelli, and "others as yet unknown" were named as targets (G.App. 1).

The interception of oral communications at Apartment 309 was accomplished through the secret placement of listening devices inside the apartment. The devices were installed on the evening of December 8, 1972. Building Superintendent Kenneth Mars provided the installing agents with a key to gain entry (H. 319, 326). The agents re-entered the apartment, if at all, only once during the pendency of these two orders to reposition one of the listening devices that had been unproductive (H. 332-333).

The interceptions at the Hiway Lounge were conducted pursuant to three court orders (hereinafter Hiway I, Hiway II, and Hiway III). Order Hiway I was issued by Judge John R. Bartels on April 12, 1973, and authorized the interception of oral communications at the Lounge for a period of 15 days, excluding Sundays. The named targets were appellants Napoli, Sr., Napoli, Jr., DiMatteo, and DeLuca, as well as Martin Cassella and Richard Bascetta (J.A. II 274). Order Hiway II was also issued by Judge Bartels, on May 3, 1973, and authorized a continuation of the

Lounge interceptions for a period of fifteen days, excluding Sundays (G.App. 25). The order named most of the same targets as had been named in order Hiway I. A third order in the Hiway series issued on May 24, 1973; none of the evidence seized under that order was introduced into evidence in this case.

FBI agents entered the Hiway Lounge on the night of April 12-13 with a passkey and installed two listening devices inside the Lounge, one at the bar and one in a back room. Once during the pendency of order Hiway I, the agents returned to the Lounge to move the device that had initially been placed at the bar into the back room. During the three day pause between orders Hiway I and II, Judge Judd issued an order authorizing the agents to enter the Lounge on the night of May 2-3 to restore the batteries in the devices so that interceptions could promptly resume upon the issuance of Hiway II the next day. During the pendency of either Hiway II or III, the agents re-entered the Lounge again to rejuvenate the batteries in the listening devices (H. 70-71).

ARGUMENT

I. THE DISTRICT COURT PROPERLY REJECTED APPELLANTS' MOTIONS TO SUPPRESS

- A. The covert entries of Apartment 309 and the Hiway Lounge by federal agents to install and maintain equipment necessary to conduct court-ordered electronic surveillance do not warrant suppression of the evidence gathered during the surveillance

Appellants urge that the evidence derived from electronic surveillance should have been suppressed because the surreptitious entries into Apartment 309 and the Hiway Lounge necessary to conduct the surveillance were unlawful. They argue that Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. 2510 et seq., does not empower district courts to authorize such entries; that the judges who issued the electronic surveillance orders in this case did not intend to authorize the entries; that entries to execute electronic surveillance orders are in any event unlawful unless authorized by separate search warrants; and that the one entry in this case that was explicitly authorized by a separate court order was nevertheless unlawful. We first address the question whether appellants have standing to raise these claims and then answer each of their substantive contentions on the merits.

1. None of these appellants has standing to contest the surreptitious entries of apartment 309 and only appellant Napoli, Sr. has standing to contest the entries of the Hiway Lounge

a. All appellants were overheard during the electronic surveillance of either Apartment 309 or the Hiway Lounge or both and are accordingly "aggrieved persons" within the meaning of 18 U.S.C. 2510(11). That fact alone, however, does not dispose of the question whether they have standing to challenge the legality of the entries onto those premises. On the contrary, Congress did not intend to grant broader standing under Title III to challenge assertedly illegal entries than is conferred by the law of search and seizure generally. See S.Rep. No. 1097, 90th Cong., 2d Sess. 91, 106 (1968); Alderman v. United States, 394 U.S. 165, 175-176 n.9 (1969); United States v. Scully, 546 F.2d 255, 268 (9th Cir. 1976); United States v. Scasino, 513 F.2d 47, 50 (5th Cir. 1975); United States v. King, 478 F.2d 494, 506 (9th Cir. 1973), cert. denied, 414 U.S. 846, 417 U.S. 920. Thus, that any particular appellant is an "aggrieved person" does not entitle him to urge suppression on account of alleged misconduct that did not violate his own right of privacy, since "Fourth Amendment rights are personal rights which. . . may not be vicariously asserted." Alderman v. United States, supra, 394 U.S. at 174. See also United States v. Poeta, 455 F.2d 117, (2nd Cir. 1972), cert. denied, 406 U.S. 948; United States v. Hinton, 543 F.2d 1002, 1011-1012 n.13 (2nd Cir. 1976); United States v. Ramsey, 503 F.2d 524, 532 (7th Cir. 1974) (Stevens,

J.), cert. denied, 420 U.S. 932.^{2/}

In order to challenge the lawfulness of an intrusion upon private premises, a defendant must show either that he was on the premises at the time of the intrusion or that he has a possessory or proprietary interest therein. Brown v. United States, 411 U.S. 223, 229 (1973).^{3/} Under this standard, none of these appellants has standing to contest the entries of Apartment 309, and only appellant Napoli, Sr. has standing to contest the entries of the Hiway Lounge.

(1) Apartment 309

Mascitti and DiMatteo, the only appellants overheard during the electronic surveillance at Apartment 309, do not qualify

^{2/} In United States v. Poeta, supra, this Court held that a person overheard during the course of a wire interception does not have standing to complain that monitoring agents failed to minimize the quantity of conversations seized from the target telephone line as required by 18 U.S.C. 2518(5), unless he is the subscriber of the telephone. "[A non-subscriber] lacks standing to contest any such invasion of [the subscriber's] rights." 455 F.2d at 122 (citing Alderman v. United States, supra). In United States v. Hinton, supra, this Court expressed doubt as to whether several defendants had standing to urge suppression of their conversations on minimization grounds because none of those defendants were residents of the home where the monitored phone was located. Similarly, in United States v. Ramsey, supra, the Seventh Circuit Court of Appeals found that Title III's minimization requirement was enacted "to protect [from indiscriminate intrusion] the privacy interests of [the subscriber], members of the subscriber's family, possibly other regular users of the telephone, and conceivably any casual caller engaging in innocent conversation." 503 F.2d at 532. Accordingly, the Ramsey court held that a defendant lacked standing to raise the government's failure to minimize as grounds for suppressing his conversations, since he was not a subscriber or regular user of the target telephone and the only conversations in which he participated over the monitored line related to the criminal "transactions which were the specific target of the intercept order." Id.

^{3/} A defendant may also attain standing to challenge a search and seizure if he is "charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." Brown v. United States, supra, 411 U.S. at 229; see also United States v. Galante, 547 F.2d 733, 737-740 (2nd Cir. 1976). This standing rule is clearly inapplicable to this case.

under either test of standing established in Brown.^{4/} It is undisputed that they were not in the apartment during any of the entries,^{5/} nor have they shown that they had a sufficient general privacy interest in the premises to enable them to complain about intrusions accomplished when they were absent. The apartment was leased by Phyllis Engert, a friend of Appellant Mascitti who lived there alone (T. 1730-1732). At trial, Engert testified that Mascitti asked her permission to use the apartment for undisclosed purposes in early November 1972 (T. 1782-1783) and that, pursuant to their agreement, Mascitti along with DiMatteo (then known to Engert only as "Tony Apples") began shortly thereafter to occupy the premises during the afternoons, Monday through Saturday, while

4/ Appellant Voulo claims (Brief for Voulo at 8n.) standing to challenge the entries of Apartment 309 because some of the evidence gathered through the "bugging" of the apartment provided probable cause for the issuance of the Howard Beach wiretap order and the Hiway Lounge bugging orders pursuant to which he was overheard. However, because Voulo was not overheard during the Apartment 309 intercepts and alleges no possessory or proprietary interest in the apartment, he lacks standing to attack the Apartment 309 interceptions on any ground, and he is not entitled to suppression of any of the evidence gathered from the apartment or any fruits thereof, whether or not the bugging of the apartments was lawful. United States v. Wright, 524 F.2d 1100, 1102 (2nd Cir. 1975); United States v. Scasino, 513 F.2d 47, 50-51 (5th Cir. 1975).

5/ Appellants claim that it would be "utterly Kafkaesque" to disqualify them on this ground, "since the entry was deliberately scheduled to occur when no one would be present" (Mascitti at p. 43n.). This novel claim embodies a misconception of the rules of standing, which were fashioned to implement the Fourth Amendment's protection of legitimate expectations of privacy. This aspect of the rules simply reflects the truism that, unless a person enjoys a possessory or proprietary interest in an enclosure, he has an expectation of privacy in it only when he is there. He suffers no invasion of privacy if someone else enters the enclosure while he is away. That he is spared such injury by design is irrelevant. Thus, in Brown v. United States, *supra*, the Supreme Court refused to accord the petitioners standing to contest an illegal search carried out after they had been arrested and confined because, *inter alia*, they were not on the premises searched at the time of the illegal invasion.

she was away at work (T. 1785-1789). Usually, the two men had departed by the time she arrived home, or shortly thereafter. On the few occasions she was on the premises at the same time Mascitti and DiMatteo were there, she saw them working at the dining room table, using a calculator and sheets of paper with lists of numbers written on them (T. 1789-1790, 1794). Engert further testified that Mascitti and DiMatteo abandoned her apartment entirely once Mascitti suspected that law enforcement authorities were watching it (T. 1795).

It is thus clear that DiMatteo and Mascitti were at the premises for a very limited purpose -- to prepare policy ribbons and master sheets after each day's winning number had been announced. After they finished their daily work, they left the apartment, and, when they discovered that the FBI had the premises under physical surveillance, they moved elsewhere. Such a narrowly focused relationship with the premises, confined to a few hours in the afternoon on business days for the purpose of conducting an illicit policy bank, did not give appellants "sufficient control over the premises to establish a right to privacy therein." United States v. Parizo, 514 F.2d 52, 54 (2nd Cir. 1975). While DiMatteo and Mascitti make much of the fact that Engert provided them with a key to the apartment (e.g., DiMatteo at 13-14), this arrangement existed only to make it possible for appellants to make their daily afternoon entries while Engert was at work. Appellants have made no showing that the occupant of the apartment thereby intended to grant them

unrestricted access to it.^{6/} On the contrary, as the court below held (J.A. I 129), appellant's arrangement with Engert at most gave them a license to use the premises for a limited time and purpose during the day; "it did not give them a proprietary interest to challenge nighttime entry."^{7/}

^{6/} Thus, appellants' reliance (Mascitti at 45; DiMatteo at 15) on Baker v. United States, 401 F.2d 958 (D.C. Cir. 1968), is misplaced. In Baker, the court held that the defendant had standing to move to suppress all electronic surveillance evidence gathered through the unauthorized "bugging" of a hotel suite, whether or not the defendant participated in any of the conversations overheard, because the defendant had a key to the suite and "was authorized by the owner to use the suite at any time." 401 F.2d at 982 (emphasis added). Because the defendant enjoyed unrestricted access to the suite and in fact used it regularly as an office to conduct business meetings and to make telephone calls, the court concluded that the defendant possessed a legitimate "expectation of freedom from governmental intrusion" (401 F.2d at 983) in the suite that was violated by the electronic trespass of the premises, regardless of whether the defendant was overheard as a result of that trespass. In contrast to the situation in Baker, appellants DiMatteo and Mascitti have made no showing that Engert intended to grant them unrestricted access to the apartment by giving them a key or that they in fact enjoyed such unrestricted access through their possession of a key.

^{7/} All of the cases cited by appellants to buttress their contention that they had a possessory interest in Apartment 309 are distinguishable (see Brief for Mascitti at 44). In United States v. Burke, 506 F.2d 1165, 1170-1171 (9th Cir. 1974), cert. denied, 421 U.S. 925, the court accorded the defendant standing to contest the search of a van on the basis of his testimony that the van was "really his," although title was held by his brother. In United States v. Miguel, 340 F.2d 812, 841-842 (2nd Cir. 1965), cert. denied, 382 U.S. 359, the court expressly reserved judgment on the standing issue, although it hypothesized that the defendant had standing to challenge the search of his girlfriend's apartment because he lived there from time to time and kept his clothes there, circumstances lacking in this case. In Walker v. Peppersack, 316 F.2d 119, 125 (4th Cir. 1963), the court found that the defendant had standing to challenge the search of his common-law wife's residence because "he was actually occupying the apartment, living there for the time being." In Patler v. Slayton, 503 F.2d 472, 477-478 (4th Cir. 1974), the court held that the defendant had standing to challenge the warrantless search of a field on his father-in-law's farm and the seizure of some shell casings abandoned there, because the defendant and his family often used the farm. The court refused (footnote continued on the next page)

(2) The Hiway Lounge

The evidence adduced at the pre-trial hearing on appellants' motions to suppress showed that only appellant Napoli, Sr., had a sufficient interest in the Hiway Lounge to establish standing to challenge the entries of those premises. Raphaela Pascocello, the sister of Napoli, Sr., testified at the hearing that she had placed Napoli, Sr. in charge of the Hiway Lounge, which she owned (H. 9-13). As manager of the Lounge, Napoli, Sr. acquired supplies for the business, maintained the building where the Lounge was located and generally supervised its day-to-day operation (H. 13). Mrs. Pascocello did not play an active role in its affairs and relied upon her brother to see that her financial affairs were in order and that the Lounge was profitably run (H. 21, 24, 28-29). On the basis of Mrs. Pascocello's testimony, the district court concluded (J.A. I 129-130) - correctly, in our view - that Napoli, Sr. had a possessory interest in the Lounge.

Of the other appellants overheard during the Hiway Lounge interceptions, only appellant Napoli, Jr., claims (Napoli, Jr. at 15) that his interest in the Lounge was sufficient to confer standing upon him to challenge the surreptitious entries of

7/ (footnote cont'd)

to suppress the shell casings, however, because the defendant "failed to demonstrate a reasonable expectation of privacy" in the field. Although the court obviously reached the correct result, we submit that its rationale for refusing to suppress the casings is logically inconsistent with its determination of the standing issue. One has standing to complain about police conduct violative of the Fourth Amendment only if that conduct has breached his own right of privacy. Alderman v. United States, supra. Properly understood, the case stands for the proposition that one who only occasionally uses private property acquires no right of privacy therein sufficient to enable him to complain about invasions of the property in his absence.

those premises.^{8/} But the record is almost wholly devoid of evidence to support this claim. Mrs. Pascocello testified only that she believed her nephew "Junior" had a key to the Lounge and that "Junior" occasionally brought checks to her for her signature that were to be used to pay Lounge bills (H. 14-15). No other evidence was presented to show the nature of Napoli, Jr.'s relationship with the premises. Although it was his burden to establish standing (see Jones v. United States, 362 U.S. 257, 261 (1960); United States v. Masterson, 383 F.2d 610 (2nd Cir. 1967)), Napoli, Jr. did not come forward with any evidence tending to show the nature of his responsibility for the operation of the Lounge, if any; the degree of his involvement in financial affairs; the amount of time he spent on the premises; or what he did while he was there. Mrs. Pascocello's two oblique references to "Junior," without more, demonstrated only that Napoli, Jr. maintained a casual relationship with the premises arising from his kinship with its owner and its manager. Since Napoli, Jr. failed to establish that he exercised the kind of control over the Lounge that would enable him to claim a general right of privacy therein, the district court correctly ruled (J.A. I 130 n.12) that he lacked standing to complain about intrusions upon those premises that occurred while he was not there.

^{8/} Appellants Vigorito, Mascitti, DiMatteo, and Voulo, all of whom also claim standing to challenge the entries of the Hiway Lounge, did not allege in the district court, and do not argue before this Court, that they enjoyed a possessory or proprietary interest in the Lounge. Rather, their standing claim rests solely on their status as persons aggrieved by the interception of their conversations at the Lounge under Title III (see Vigorito at 25-26; Mascitti at 39; DiMatteo at 13, 23 et seq.; Voulo at 8-9). As we demonstrate infra at pp. 19-20, this is not a sufficient basis to confer standing to challenge the entries.

b. The fact that the entries of Apartment 309 and the Hiway Lounge enabled the monitoring agents to seize appellants' conversations does not establish standing to contest the legality of those entries. The law is clear that a defendant whose property is seized in his absence after an assertedly illegal entry onto the premises of another does not have standing to challenge the entry even though, had it not occurred, the incriminating evidence would not have been obtained. Brown v. United States, supra; United States v. Galante, 547 F.2d 733, 739-740 (2nd Cir. 1976); United States v. Sacco, 436 F.2d 780, 784 (2nd Cir. 1971), cert. denied, 404 U.S. 834. See also United States v. Lisk, 522 F.2d 228, 230-231 (7th Cir. 1975) (Stevens, J.), cert. denied, 423 U.S. 1078; United States v. Calhoun, 510 F.2d 861, 866 n.4 (7th Cir. 1975), cert. denied, 421 U.S. 950. Thus, for example, if appellants DiMatteo and Mascitti transcribed their gambling-related conversations and had left the transcripts at Apartment 309 for safekeeping, they would not have had standing to complain that the transcripts had been seized by means of a warrantless entry of the apartment. Their proprietary interest in the transcripts might entitle them to contest the legality of the seizure itself, for example, on the ground that the government seized the transcripts without probable cause to believe that they were evidence of a crime; but that interest alone would not be sufficient to confer standing upon them to contest the manner in which the agents came to find the transcripts. United States v. Lisk, supra. Similarly, while appellants have standing to challenge the interception of their communica-

tions under Title III on the ground that the interceptions directly infringed their right of conversational privacy, their interest in the communications seized does not entitle them to complain that the monitoring agents may have committed an unlawful trespass against the premises of another in order to effect the seizure.^{9/}

^{9/} Alderman v. United States, supra, is not to the contrary. There the government had intercepted conversations within private premises without any court authorization. The Court concluded that each person overheard during the course of the surveillance had standing to complain about the warrantless seizure of any conversation in which he participated, and that the owner of the premises had standing to move to suppress all of the conversations overheard there, whether or not he was a participant, because they were the fruits of an electronic search of his house. Since the non-homeowner defendants in Alderman were clearly entitled to suppression because their conversations had been intercepted without court order, the Court was not confronted with and did not reach the standing issue involved in this case -- whether one who has been overheard pursuant to court order on private premises he does not own may move to suppress his conversations on the ground that an entry of the premises in his absence to execute the order may have been unlawful. However, by holding that the homeowner had standing to suppress any conversation seized from his premises, whether or not he was a participant, the Court explicitly recognized the distinction between standing predicated on one's interest in the premises where interceptions have occurred and standing predicated on one's interest in conversational privacy. That distinction, in our view, is dispositive of the standing issue in this case.

2. Title III empowers courts to authorize covert entries for the purpose of installing electronic listening devices

There is no substance in appellants' claim (Mascitti at 25-30) that Title III does not empower courts to authorize covert entries, on probable cause, for the purpose of installing or removing electronic surveillance equipment. That Congress intended to authorize courts to permit such entries is clear both from the legislative history of Title III and the language of the statute. Every court that has considered the issue has concluded, as did the court below (J.A. I 127-135), that "Congress must be taken at least to have granted or implicitly recognized the general power of a court to authorize a covert and possibly otherwise illegal entry to place a 'bug'" when necessary to accomplish court-ordered electronic surveillance." United States v. Ford, 414 F.Supp. 879, 883 (D.D.C. 1976), aff'd, Nos. 76-1467 et seq. (D.C. Cir. February 11, 1977). See also United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976), cert. denied, No. 76-5446, January 10, 1977.

Title III expressly authorizes the interception of both "oral" and "wire" communications (18 U.S.C. 2518(1)). While the interception of wire communications is typically accomplished by means of an outside connection with a telephone line (see Berger v. New York, 388 U.S. 41, 46 (1967)), electronic eavesdropping has traditionally required the secret placement of a transmitting device (commonly known as a "bug") inside the area where the conversations are expected to occur. Id. at 47. See also Silverman v. United States, 365 U.S. 505, 510 (1961); Lopez

v. United States, 373 U.S. 427, 467, n.15 (1963) (Brennan, J., dissenting). That Congress was aware that the successful interception of oral communications under the statute would entail surreptitious entry is clearly reflected in the congressional debates concerning Title III. For example, Senator Morse, an opponent of Title III who feared that its eavesdropping provisions would result in indiscriminate invasions of individual privacy by law enforcement authorities, stated:

I know that elaborate efforts are made to distinguish between a real wiretap, or bug, which requires someone to intrude upon private premises to install. The kind of invasion is truly a search, requiring a warrant under conditions set forth in article 4. But electronic surveillance, whereby conversations can be picked up from scores of feet away, without any physical intrusion upon the premises involved, is a far more insidious invasion of privacy, and one which I do not believe should be tolerated at all.

11 Cong.Rec. 11598 (1968) (emphasis supplied). Later, Senator Tydings, a proponent of Title III, argued that there was no reason to fear that traditional investigative techniques would be junked wholesale in favor of electronic surveillance, partly because:

[electronic] surveillance is very difficult to use. Taps must be installed on telephones, and wires strung. Bugs are difficult to install in many places since surreptitious [sic] entry is often impossible. Often, more than one entry is necessary to adjust equipment. Static and room noise interfere. Devices can be discovered. Wireless transmission can be intercepted.

114 Cong. Rec. 12989 (1968) (emphasis supplied). See also 114 Cong.Rec. 14161, 14732-14734 (1968); S.Rep. No. 1097, 90th Cong., 2d Sess. 67, 103 (1968). Moreover, the legislative history unambiguously shows that the electronic eavesdropping provisions

of Title III were expressly drafted with a detailed knowledge of, and in direct response to, the Supreme Court's decision in Berger v. New York, supra, which involved a secret entry onto business premises for the purpose of planting a "bug". See id. at 45; United States v. United States District Court, 407 U.S. 297, 302; S.Rep. No. 1097, supra, at 66, 74-75; 114 Cong.Rec. 14708-14710 (1968).

Against this background, the failure of Title III to contain a specific provision relating to the permissible means of entry to install and remove an electronic listening device does not indicate that Congress intended to deprive the courts of authority to order forcible or surreptitious intrusions if that was the only way to assure success and avoid detection. On the contrary,^{10/} Congress simply neglected to address the obvious. Other provisions of the statute plainly reflect Congress' awareness that trespass onto private premises would often be necessary to the successful accomplishment of court-ordered electronic surveillance. For example, Congress required that an application for a surveillance order, and the order itself, particularly describe the "facilities from which or the place where the communication is to be intercepted." 18 U.S.C. 2518(1)(b)(ii) and (4)(b) (emphasis added). And Congress explicitly authorized

^{10/} Although the American Bar Association also has recognized that surreptitious entry must accompany the installation of most bugging devices (ABA Standards for Criminal Justice, Electronic Surveillance, General Commentary at 45, 65 n.175, 91-92; Commentary on Specific Standards at 139-140, 149; Appendix D, at 209 (Approved Draft, 1971)), it too has not adopted a specific surreptitious entry provision in either the Tentative Draft of 1968 or the Approved Draft of 1971. Compare §§5.7-5.8 at 8 in the Standards of the Tentative Draft with §§5.7-5.8 at 18-19 of the Proposed Final Draft of Standards.

a court to direct private citizens, including a "landlord, custodian or other person", to "furnish [law enforcement authorities] all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively." 18 U.S.C. 2518(4). From the legislative history of Title III as well as these provisions of the statute, it is clear that Congress intended to grant to courts the authority implicit in the orders at issue here, to enter private premises to execute the searches Congress sought to legitimize by adopting the statute in the first place.^{11/}

^{11/} Appellant Napoli, Sr. argues (Napoli, Sr. at 12-13) that all covert entries for the purpose of executing electronic surveillance orders violate the Fourth Amendment, even if they are conducted pursuant to explicit antecedent judicial authorization, and that Title III is unconstitutional on its face if it is construed to permit such entries. This contention is untenable. Katz v. United States, 389 U.S. 347 (1967), on which Napoli, Sr. primarily relies for this proposition, does not hold that electronic surveillance may be constitutionally employed only if it does not require a physical trespass. Rather, Katz holds that the warrant requirement of the Fourth Amendment governs electronic searches and seizures whether or not there is a physical penetration of the area searched. Nor does the fact that such entries must be made without notice to the target of the surveillance render them unconstitutional. Katz v. United States, supra, at 355-356 n. 16.

3. The court orders authorizing interception of oral communications at Apartment 309 and the Hiway Lounge implicitly authorized federal agents surreptitiously to enter those premises to install electronic surveillance devices

In light of the information set forth in the orders authorizing electronic surveillance at Apartment 309 and at the Hiway Lounge, as well as in the government's applications and affidavits supporting those orders, we think it beyond reasonable dispute that the experienced issuing judges recognized that successful execution of their orders would require secret placement of listening devices on the subject premises and that they intended to authorize entries for that purpose. Both orders authorized seizure of "oral communications", which, as we have noted, typically requires covert entry of the premises to be electronically searched. Contrary to appellants' suggestion, neither application contained information which conceivably could have led the issuing judges to believe that the agents had infiltrated appellants' gambling operation and planned to accomplish the proposed interceptions through the use of so-called "bugged informants." Indeed, since the government is not required to obtain antecedent judicial authorization in order to use a "bugged informant" (see 18 U.S.C. 2511(2)(c) and (d); Lopez v. United States, supra), those judges could not have thought the government had come to them seeking such authorization. Moreover, the government's applications sought permission to intercept conversations "between trusted bank employees" (J.A. II 266) inside Apartment 309 while they were performing lottery-related

duties, and communications between lottery financier James Napoli, Sr. and his subordinates as they met to discuss the operation of the lottery inside the Hiway Lounge; the orders authorized such interceptions whenever "it has been determined that at least one of [the named lottery personnel] is at the. . . premises." A fair reading of these provisions of the orders and their supporting applications and affidavits demonstrates that the issuing judges contemplated that the interceptions would be made with the aid of an electronic device implanted on the premises which could be activated whenever surveilling agents outside the premises observed one of the target individuals enter. The evidence is clear that, when the issuing judges authorized the interceptions, they understood and necessarily approved the entries needed to accomplish them.^{12/}

^{12/} We further note that both issuing judges received actual notice of the entries. Special Attorney Fred Barlow testified (H. 498-500; J.A. II 227-229), and the court below found (J.A. I 132-133), that he orally informed Judge Bartels of the government's intention to enter the Hiway Lounge surreptitiously before Judge Bartels issued the April 12, 1973, order. If Judge Bartels had not intended to authorize such an entry, he surely would not have issued the order. Judge Judd was told that "[i]nallation of monitoring equipment for Apartment 309 occurred at 8:05 p.m. on December 8, 1972." That information was relayed to him in an interception progress report filed by Special Attorney Barlow dated December 18, 1972. (Supp. App. to Brief for DiMatteo 3-4). If Judge Judd believed that the agents had abused the authority conferred by his order when they installed monitoring equipment at Apartment 309, he surely would have revoked the order and commanded that the interceptions cease. He did not take such action, and the interceptions continued at Apartment 309 until the order expired on December 25, 1972.

4. When an electronic surveillance order issues on a showing of probable cause to believe that criminal conversations may be overheard at a particular place and authorizes their seizure, the order need not in addition explicitly authorize the entry necessary to effect the seizure

a. The initial entries were implicitly authorized by the orders for interceptions at the designated sites, just as the entry necessary to make a physical search is implicitly authorized by a conventional search warrant naming the place to be searched.

Appellants argue that the failure of the issuing judges to include on the face of their interception orders an explicit authorization for the entries necessary to execute those orders violated the warrant requirement of the Fourth Amendment. Specifically, they contend that a physical trespass onto private premises "involve[s] an additional and extraordinary invasion of privacy over and above the interception of conversation" (Mascitti at 31). Although a court order authorizing seizure of a person's oral communications lawfully overrides his interest in conversational privacy, an entry to effect the seizure, according to appellants, implicates this separate interest which cannot lawfully be invaded without separate, explicit court approval.

In our view, this argument misperceives the nature of the constitutional guarantee upon which it depends. "[T]he principal object of the Fourth Amendment is the protection of privacy rather than property." Warden v. Hayden, 387 U.S. 294, 304 (1967). That protection is achieved by requiring the use of warrants issued on probable cause, which "particularly describ[e]

the place to be searched, and the persons or things to be seized," thereby interposing "a magistrate between the citizen and the police" McDonald v. United States, 335 U.S. 451, 455.

The intrusion sanctioned by a conventional search warrant authorizing seizure of tangible evidence located in a particular place has traditionally been considered a single invasion of privacy for Fourth Amendment purposes requiring a single warrant, even though the intrusion implicates both the target's interest in the private, uninterrupted enjoyment of the property seized as well as his interest in the privacy of the premises. The showing necessary to secure a warrant authorizing such an intrusion -- that the items sought are probably evidence of a particular crime and are probably located at a designated place -- is sufficient to override both "interests" implicated by the intrusion. The warrant itself need only particularly describe the premises to be searched and the things to be seized. It does not have to explicitly authorize an entry into the premises, without which the contemplated search obviously cannot occur at all.

There is no reason why an electronic search pursuant to a Title III order should be treated differently. Before securing orders authorizing the seizure of oral communications in this case, the government submitted detailed affidavits to two district judges establishing probable cause to believe that conversations concerning an illegal enterprise could be overheard at specified locations. Like conventional search warrants, the order in this case particularly described the conversations to be seized and the premises to be searched. The requirements of the Fourth

Amendment were therefore satisfied. The fact that "[t]he installation of a bug [by means of a physical trespass] affords the agents of the state unrestricted access to every corner of an individual's premises while searching for a location to place the bug" (Mascitti at 31) does not justify a departure from the traditional procedure for securing warrants under the Fourth Amendment. A police officer armed with a conventional search warrant enjoys equally unrestricted access to the premises specified in the warrant while he is searching for seizable items, and he inevitably sees items unrelated to the purpose of the search. See Berger v. New York, supra, 388 U.S. at 108 (White, J. dissenting). There is always a danger that an overzealous officer will overstep the bounds of his authority as delimited by the warrant and will search out things which he is not constitutionally entitled to see. The issuance of a separate warrant authorizing an entry for the purpose of conducting electronic surveillance would in no measure protect against such abuses.

13/

Berger v. New York, supra, and Katz v. United States, supra, do not support appellant's argument. In Berger, the Court held 13/ A panel of the court of appeals for the District of Columbia Circuit has held that police officers may not enter private premises for the purpose of executing an electronic surveillance order unless the order explicitly authorizes such an entry and particularly prescribes the manner and time of entry. United States v. Ford, No. 76-1467, decided February 11, 1977. The decision in Ford, like appellants' argument, rests on the faulty premise "that entries to plant 'bugs' are themselves invasions of privacy distinct from the actual eavesdrop, and therefore require separate consideration in the warrant procedure." Id., slip opinion at 55. The additional requirement imposed by the Ford court -- that a "bugging" order must particularly prescribe the time and manner of entry -- is wholly without precedent in prior case law interpreting the Fourth Amendment. There is no constitutional requirement that a conventional search warrant prescribe (footnote continued on the next page)

unconstitutional New York's procedure for the issuance of eavesdropping warrants and set forth in great detail the prerequisites of a valid procedure. Title III was, in fact, shaped largely to conform to Berger's requirements. Significantly, however, although that case involved a covert "trespassory intrusion into a constitutionally protected area" (388 U.S. at 44), the Court did not fault the New York procedure for failing to require that an eavesdropping warrant explicitly authorize any surreptitious entries necessary to execute the warrant.

Katz extended the protections of the Fourth Amendment to non-trespassory electronic searches, thereby overruling a long line of authority which had held that eavesdropping was not subject to the warrant requirement unless accompanied by actual physical penetration of a constitutionally protected area. In doing so, however, the Court nowhere suggested that electronic surveillance accomplished by means of a physical trespass would henceforth require two warrants instead of one. On the contrary, after Katz, "the presence or absence of a physical intrusion into any given enclosure. . . can have no constitutional significance" (389 U.S. at 353). Recognizing that the privacy of the home could be defeated as effectively by electronic intrusion as by actual

13 (footnote cont'd)
the manner or time of the entry authorized. The Warrant Clause requires only that a search warrant particularly describe the place to be searched and the items to be seized. There is likewise no statutory requirement that a conventional search warrant prescribe the manner of its execution, and the only requirement imposed by statute concerning the time of entry provides that, if a conventional warrant is to be executed "at times other than daytime", it must state so on its face. See F.R.Crim.P. 41(c). In sum, we strongly believe that Ford was wrongly decided and should not be followed by this Court.

physical intrusion for the purpose of eavesdropping, the Court held that all non-consensual eavesdropping, whether or not accomplished by means of a physical trespass onto private property, required a warrant under the Fourth Amendment. The court orders in this case -- which issued on probable cause and particularly described the places to be searched and the conversations to be seized -- fully complied with the holding in Katz.^{14/}

14/ Appellant Mascitti also suggests (Brief at 32, 37-39) that the Fourth Amendment requires law enforcement officers to use the least intrusive investigative technique available to them in any given situation. From that premise, Mascitti argues that the government should be required to secure a separate warrant authorizing an entry necessary for the execution of a "bugging" order so that a neutral magistrate can determine whether there is a "paramount need" for the procedure sought or whether other investigative tools at hand would do just as well. The court of appeals in United States v. Ford, *supra*, invoked a similar rationale in support of its decision. See slip opinion at 23-27.

We are not aware of any case in which a conventional search under color of warrant has been invalidated because the police possessed or could have gathered evidence arguably sufficient to obtain a conviction without the evidence seized under the warrant.

At all events, Title III requires an applicant for an electronic surveillance order to show that non-electronic "investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. 2518(3)(c). As the Court below held (J.A. I 97-101), and as we show as to order 309 I in pp. 44-47 *infra*, the government met this burden in its applications for the surveillance orders in this case. The statute does not, however, declare a preference for wire interception or for the use of parabolic microphones over the procedures adopted here, and, once the government has satisfied Section 2518(3)(c), it is not required to show a "paramount need" for using a "bug" to intercept oral communications rather than some other available technology. Moreover, we doubt that the use of these other, equally sophisticated techniques would enhance the privacy or other interests protected by the Fourth Amendment. Cf. Katz, *supra*, 389 U.S. at 350.

b. Subsequent entries undertaken during the pendency of the orders to maintain the electronic surveillance equipment already installed did not require a separate warrant.

Appellants also complain that the monitoring agents failed to obtain a separate search warrant each time it was necessary to re-enter Apartment 309 and the Hiway Lounge to maintain the listening devices in working order. But whether this is so turns upon whether those re-entries involved any significantly greater invasion of constitutionally protected privacy than was lawfully underway pursuant to the "bugging" orders that had already issued. See Katz v. United States, supra; Chambers v. Maroney, 399 U.S. 42, 51-52 (1970). In our view, no additional intrusion of the sort requiring separate antecedent judicial approval occurred when the agents re-entered the subject premises.

The order authorizing the interception of oral communications at Apartment 309 and the Hiway Lounge permitted a substantial and continuing intrusion upon the privacy of those premises during the life of the orders. The magnitude and duration of that intrusion was fully justified by the government's showing in the supporting affidavits and applications that there was probable cause to believe that conversations proving the existence of a large-scale criminal enterprise could be seized from those premises over the period of authorized interceptions. The re-entries during the pendency of those orders, undertaken for the limited purpose of maintaining the listening devices lawfully installed there so that the seizures commanded could be successfully accomplished, did not add to a constitutionally significant

degree to the invasion of privacy already authorized and underway. The privacy of the apartment and of the Lounge had already been lawfully defeated when the entries occurred.^{15/}

The re-entries were carried out during the pendency of the orders,^{16/} and were accordingly supported by the same probable cause that initially had justified issuance of the orders. They were undertaken solely to maintain the procedures already approved and were conducted expeditiously and in a manner consistent with that purpose. Appellants do not claim, nor could they on this record, that the re-entries were made as a pretext to enable the agents to search out other evidence which the intercept orders did not permit them to seize. On the contrary, the only "fruits" of the re-entries were subsequent gambling-related conversations on the premises between these appellants, precisely the evidence which the intercept orders empowered the government to seize.

15/ Cf. United States v. Robinson, 414 U.S. 218, 237 (1973) (Concurring opinion of Mr. Justice Powell). The defendant in Robinson was arrested for a traffic infraction, whereupon the arresting officer made a thorough, on-the-street search of his person, including an inspection of a crumpled cigarette package the officer had removed from the defendant's breast pocket and physical exploration around the defendant's waist, trouser legs, and remaining pockets (414 U.S. at 220-223). The Supreme Court held that the evidence (several heroin capsules) thus gathered was properly discovered as the product of a search incident to the arrest. Mr. Justice Powell, in concurring, thought that "the privacy interest protected by [the Fourth Amendment] is legitimately abated by the fact of [lawful] arrest." (Id. at 238)

An analogous principle applies here. While the court's orders for these interceptions did not, of course, effect the arrest of any person, they did, for the period of their pendency, seriously but lawfully compromise the privacy of the premises involved in much the same way as an arrest compromises the privacy of the person arrested. Moreover, as we note in the text, the re-entries were based on continuing probable cause, rather than simply on suspicion, and the invasion of privacy they represented was certainly no more intrusive than a personal search on a public street.

16/ The government sought and received antecedent court approval for the one entry not made during the pendency of an order. See pp. 35-38, infra.

In all the circumstances, separate warrants for each re-entry would have been superfluous and, consequently, the failure to obtain them is not grounds for suppressing any of the government's electronic surveillance evidence.

5. The court-ordered entry of the Hiway Lounge on the night of May 2-3, 1973, was lawful, and the conversations intercepted the next day were, therefore, properly obtained

1. Near the end of the Hiway I interceptions, April 25, 1973, monitoring agents overheard plans for an important meeting between Napoli, Sr. and some of his associates scheduled for the afternoon of May 3, 1973. The agents' reception of the conversations transmitted on the final day of Hiway I, was of such poor quality, however, that they concluded that the battery-operated listening device planted in the Lounge would have to be repaired before any further interceptions could occur.

This information was relayed to Special Attorney Barlow, who had already forwarded the necessary documents to Washington seeking approval from the Attorney General for a continuation of the Hiway interceptions. Although Barlow anticipated that the Attorney General's extension authorization would arrive in Brooklyn around mid-day on May 3^{17/} and that an extension order, if granted, could be obtained in time to permit interception of the important May 3 meeting, the first opportunity after issuance of the extension order to rejuvenate the dead batteries would not come until the evening of May 3. Thus, unless the device could be repaired before the extension order went into effect, the May 3 meeting could not be intercepted.

Confronted with this dilemma, Barlow appeared before Judge Orrin G. Judd in the early evening of May 2 and explained the

^{17/} Barlow was in constant telephone contact with the Office of the Attorney General throughout May 2 to check on the progress of the extension request (G.Exh. admitted at H. 134).

government's predicament. On the basis of what Barlow told him, Judge Judd issued an order authorizing FBI agents to enter the Lounge on the night of May 2-3, 1973, so that they could restore the dead batteries (J.A. II 303). The order further directed the Special Attorney to submit an affidavit to Judge Judd the following day setting forth the information of which he had advised the Judge orally and on the basis of which the order had issued.

The order was executed on the night of May 2-3, 1973, and the listening device was repaired. The next day, Barlow submitted the required affidavit (G.A. 71-72). As expected, the Attorney General's authorization for an extension order arrived at approximately noon on May 3, and order Hiway II was promptly secured from Judge John R. Bartels that afternoon. Interceptions pursuant to the extension order began immediately.

2. The district court properly rejected the claim repeated here by appellants Napoli, Sr. and Mascitti (Napoli, Sr. at 37-43; Mascitti at 39), that Judge Judd issued the order of May 2 unlawfully and that the entry pursuant to that order was therefore illegal. As the district court explained (J.A. I 135-136);

[Defendants] contend that Barlow's oral representations fell short of satisfying the requirements of 18 U.S.C. §2518(5) relating to the necessary contents of an application for an extension order. We disagree, however, with defendants' characterization of Judge Judd's May 2nd authorization as an extension order. It did not permit continued surveillance. The order simply authorized entry, seizure, and reparation of the malfunctioning devices. As such it is more properly characterized as a search warrant and the full set of requirements as detailed in 18 U.S.C. §2518(3) need not be satisfied. Only probable cause need be found to justify its issuance. More

than ample probable cause existed. Hence, the order lawfully issued (footnote omitted).

We believe that the approval of the entry in question by one district court before the fact, and by a second on review, was, in the unusual and pressing circumstances presented, correct. Contrary to appellants claim, the authorizing order did not issue in violation of the Fourth Amendment's requirement that search warrants be "supported by Oath and Affirmation." As an officer of the court, Special Attorney Barlow's oral representations before Judge Judd provided a sufficient basis upon which the court could act. Moreover, at Judge Judd's direction, Barlow submitted an affidavit setting forth the substance of his oral allegations and promptly presented it to the Judge. The order and the entry it authorized was thus bottomed on a scrupulous concern that judicial authorization be obtained for the governmental entry, notwithstanding the fast-developing events. See Osborn v. United States, 385 U.S. 323, 330 (1966).

Indeed, we are not sure but that, given the unique circumstances, Special Attorney Barlow may have done more than was required by Title III. Section 2518 (7) of the statute permits the government, in emergency situations involving "conspiratorial activities characteristic of organized crime," to intercept oral communications for up to 48 hours without court approval, so long as retroactive court authorization is later obtained. It is our submission that the government's predicament on May 2 was of such a critical nature as to qualify as an emergency under the statute. Since, in accord with section 2518(7) the government could have rejuvenated the "bug" and commenced interceptions at the Lounge

on May 3 without a court order, appellants should not be heard to complain because the government chose to follow "the procedure of antecedent justification before a [judge] that is central to the Fourth Amendment" Osborn, supra. Special Attorney Barlow's action in obtaining a court order authorizing repair of the listening device and waiting for an extension order before reinstituting interceptions at the Lounge reflected a careful recognition of the need for restraint in the government's exercise of the power conferred by Section 2518(7) to conduct temporary electronic surveillance without court supervision.

3. Even assuming that the May 2-3 entry was unlawful, however, only the conversations intercepted on May 3 would have to be suppressed. The surveillance order for Hiway II issued on May 3 would have implicitly authorized the government to enter on that date to install a working device (as we have argued supra pp. 25-26), and conversations on subsequent days accordingly would have been intercepted in any event. Since the conversations intercepted on May 3 were, in fact, only cumulative of numerous similar conversations concerning the gambling enterprise played for the jury, their introduction, if error, was harmless beyond a reasonable doubt.

B. Appellants' argument that the government violated various provisions of Title III are insubstantial

1. The affidavits submitted in support of orders 309 I and Hiway I established probable cause to believe that incriminating conversations would be overheard at the subject premises

Appellant Mascitti contends (Mascitti at 46) that the affidavit submitted in support of order 309 I did not demonstrate a sufficient nexus between the illegal activities it described and the apartment where the oral communications were to be intercepted. Appellant Napoli, Sr. makes a similar challenge (Napoli, Sr. at 47) to the sufficiency of the affidavit for interceptions in the Hiway Lounge. As we demonstrate below, the district court correctly rejected these claims (see J.A. I 87-87).

a. Apartment 309

The affidavit for order 309 I made a clear showing that appellants Mascitti (referred to in the affidavit as Barry Russo) and DiMatteo (referred to in the affidavit as Pasquale Rossetti) were operating a policy "bank" at Apartment 309. The affidavit stated that on September 13, 1972, surveillance agents observed Mascitti remove a grocery bag from a car parked near a Brooklyn bar and drop it in a trash can (J.A. II 23). FBI analysis of the betting records and slips contained in the bag revealed that they bore some of the same account designations as records that had been seized in May, 1972 during a raid of a large-scale Brooklyn policy "office" run by Joseph Mustacchio, (See J.A. II 243-245), and that at least one of the slips had been written by the same person that had prepared the records seized from that "office" (J.A. II 261A). On at least eight other occasions during the fall of 1972, Mascitti was observed at various locations in Brooklyn handling bags similar to the one

seized from the trash can on September 13 (J.A. II 248-257).

Physical surveillance of DiMatteo and Mascitti from October 16, 1972, to November 9, 1972, indicated that they were using the premises at 37-33 76th Street, Queens, as a base of operations (J.A. II 254-259); the surveillance revealed a pattern of conduct which, evaluated in light of the investigating agents' experience with gambling operations in the New York City area, established that the premises were being used as a policy "bank" by Mascitti and DiMatteo (J.A. II 244-246; 254-262).

In mid-November, Mascitti's operations shifted to Apartment 309. As the district court determined, the pattern of Mascitti's conduct at that location supported the surveilling agents' conclusion that the "bank" had been moved (J.A. II 262-265). The district court accurately outlined the affidavit's contents concerning the activities of Mascitti and DiMatteo in and around Apartment 309 as follows (J.A. I 89-91):

On November 14, 1972, Mascitti was identified entering Apartment 309 at 8-15 27th Avenue, Astoria, at approximately 4:15 p.m. The following day surveillance indicated that Mascitti's car had been parked in front of the same premises at about 4:20 p.m., Mascitti himself was seen leaving the building at 6:18 p.m. On each of the next three days, he was again seen entering the premises at approximately the same time: 4:15-4:20 p.m. And on November 20, 1972, the next day the premises were under surveillance, Mascitti was again identified specifically entering Apartment 309 with a key. A similar connection was established between the person believed to be Rossetti (later determined to be defendant DiMatteo) and Apartment 309. Physical surveillance detected him either entering or departing the building housing the apartment on at least three occasions, twice in the company of Mascitti. A check of Rossetti's arrest record revealed nine arrests for violations of the gambling laws.

Moreover, the affidavit recited that a confidential informant, who on at least twenty occasions had provided information to the FBI leading to the conviction of two and the indictment of seven persons for violation of gambling laws, told affiant of personal conversations with defendant Mustaccio during the period extending from November 14 to November 28, 1972, wherein Mustaccio admitted his continued participation in the accounting operations of policy offices. Mustaccio, on numerous occasions had been seen in the company of Mascitti and DiMatteo.

Affiant had at the time of the investigation over two and one-half years experience in investigating gambling operations and had been involved at least one and a half years with the investigation resulting in the instant indictment. It is common knowledge among experts that the policy number for each day is determined by the total amount bet at the designated racetrack. Post time of the last race during November is approximately 3:30 p.m. Such scheduling, which demands a number be bet before that time, might well yield a timetable where the last policy slips of the day are taken to the "bank" to verify "hits," or winning numbers, at approximately 4:00 to 4:30 daily. That was the time Mascitti was seen entering either Apartment 309 specifically, or 8-15 27th Avenue on at least five occasions.

As the district court's detailed discussion demonstrates, Mascitti's claim (Mascitti at 47) that his "connection to the apartment [as shown by the affidavit] was limited to a single occasion" is simply inaccurate. The affidavit contained more than ample data from which the issuing judge could reasonably conclude that DiMatteo and Mascitti were routinely using Apartment 309 as a policy "bank" and, accordingly, that conversations concerning their illegal activities could be intercepted there.

b. Hiway Lounge

The affidavit submitted in support of Hiway I likewise established the required connection between that location and illegal gambling activity. The affidavit first recounted information gathered from the electronic surveillance conducted at Apartment 309 (J.A. II 281-286). The conversations intercepted there, which were set forth in the affidavit, clearly indicated that the speakers were "bank" employees in a gambling operation headed by James V. "Jimmy Napp" Napoli, Sr. (e.g. J.A. II 281). The affidavit also contained voluminous information that had been provided by confidential informants to the effect that Napoli, Sr. used the Hiway Lounge as his headquarters and conducted frequent meetings there with lower-echelon employees of the policy operation (J.A. II 286-291).^{18/} These informants' tips were fully corroborated by the results of extensive physical surveillance of the Lounge, showing that the primary actors in the scheme frequented the premises (J.A. II 291-296). Accordingly, the affidavit established probable cause to believe that gambling-

^{18/} There is no merit in Napoli, Sr.'s argument that the credibility of the informants was not established by the affidavit (Napoli, Sr. at 49-52). The affidavit stated that each of the eight informants who had contributed information to the affidavit had provided reliable information in the past that had led to numerous convictions and arrests. Moreover, the information contributed by the informants had been obtained through personal conversations with or observations of the principals in the scheme and was substantially corroborated by those portions of the affidavit detailing the conversations intercepted at Apartment 309 and the physical surveillance of the Lounge conducted by government investigators. Thus, the affidavit adequately established that the informants were trustworthy sources of information and had gathered their information in a reliable manner. Aguilar v. Texas, 378 U.S. 108, 114 (1964); Spinelli v. United States, 393 U.S. 410 (1969).

related conversations between Napoli, Sr. and his employees
could be overheard at the Lounge.^{19/}

^{19/} Appellants Mascitti and Napoli, Sr. also suggests (Mascitti at 50; Napoli, Sr. at 48) that the information contained in the affidavits for 309 I and Hiway I was too stale to establish probable cause, because much of it dealt with events that had occurred as long as several months before the issuance of the orders. But, as the district court correctly observed (J.A. I 95-96), "[a]llege alone does not devalue information; its timeliness is more a function of subsequent corroboration. Later information serves to verify the defendants' continued involvement in gambling activity and the ongoing nature of the policy operation." See also Bastida v. Henderson, 487 F.2d 860, 864 (5th Cir. 1973); United States v. Harris, 482 F.2d 1115, 1119 (3rd Cir. 1973); United States v. Johnson, 461 F.2d 285, 287 (10th Cir. 1972). These affidavits did not simply allege isolated violations by appellants but rather sought to show their current involvement in an established lottery that had been in continuous operation for several years. Thus, the inclusion of some information that had been uncovered during earlier stages of the government's investigation of the lottery was necessary to give meaning to the data concerning the operation of the lottery and the activities of its participants in the weeks and days immediately preceding submission of the affidavits.

2. The affidavit in support of 309 I adequately demonstrated the inadequacy of conventional investigative techniques

Appellant DiMatteo contends (DiMatteo at 48) that the affidavit upon which 309 I issued was legally insufficient because it did not, as required by Section 2518(1)(c) of Title III, contain "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed or to be too dangerous." However, as the district court correctly held (J.A. I 97-101), the affidavit, when read "in a practical and commonsense fashion" (United States v. Schwartz, 535 F.2d 160, 163 (2nd Cir. 1976)), fully satisfied the requirements of Section 2518(1)(c).

Section 2518(1)(c) was designed "to assure that [electronic surveillance] is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." United States v. Kahn, 415 U.S. 143, 153 n.12 (1974). But Congress did not intend the provision "to preclude resort to electronic surveillance until after all possible means of investigation have been exhausted by investigating agents." United States v. Hinton, 543 F.2d 1002, 1011 (2nd Cir. 1976). Rather, it is enough if "the agents inform the authorizing judicial officer of the nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods." Id.; see also United States v. Matya, 541 F.2d 741, 744-745 (8th Cir. 1976), cert. denied, No. 76-503, February 22, 1977; United States v. Pacheco, 489 F.2d 554, 565

(5th Cir. 1974), cert. denied, 421 U.S. 909; S.Rep. No. 1097, 90th Cong., 2d Sess. 101. Thus, the requirement is met if the affidavit and application contain sufficient data from which the issuing judge could reasonably conclude that electronic surveillance is necessary to obtain sufficient evidence to convict persons known to be involved in the offenses under investigation or to ascertain the full scope of those offenses and the identities of all of the participants. United States v. Hinton, supra, 543 F.2d at 1011; United States v. Turner, 528 F.2d 143, 152 (9th Cir. 1975), cert. denied sub nom. Grimes v. United States, 423 U.S. 996; United States v. Armocida, 515 F.2d 29, 38 (3rd Cir. 1975), cert. denied sub nom. Conti v. United States, 423 U.S. 858; United States v. James, 494 F.2d 1007, 1016 (D.C. Cir. 1974), cert. denied sub nom. Jackson v. United States, 419 U.S. 1020.

Tested against these standards, the affidavit submitted in support of order 309 I was clearly sufficient. The affidavit showed that investigating agents, by means of extensive physical surveillance (e.g. J.A. II 245-261) and a warrant-authorized search of an apartment at 967 E. 2nd Street in Brooklyn (J.A. II 243-244), had discovered a large scale numbers operation, in which Joseph Mustacchio, Robert Voulo, Martin Griffen, Jr., Eugene Scafidi, a person known as Barry Russo, and several others worked as "bankers", runners, and controllers. From the size of the operation, as reflected by the records seized from the E. 2nd Street apartment and paper bags containing betting slips and

other wagering paraphernalia seized elsewhere, it was apparent to the agents that the individuals under physical surveillance were only lesser figures in the scheme (J.A. II 265-266); that there must be numerous other "banks" in Brooklyn serving the same gambling organization (J.A. II 266); and that the organization necessarily involved "upper echelon figures who do not physically participate in the daily operation, but who actually manage, supervise, finance, own and direct large scale policy operations and profit from the revenue generated by them" (J.A. II 265-266). The affidavit further recounted that none of these management figures had been identified by the conventional techniques employed, and that these techniques would be unlikely to yield the desired results since such persons "deliberately [limit] physical contact and participation" in the day-to-day operation of the lottery (J.A. II 266). The affidavit concluded that only by electronically penetrating a suspected policy "bank" (Apartment 309) could the investigators "[trace] the channels of illegal gambling revenues to their ultimate destination; [establish] the physical locations of other policy banks in this operation; and [determine] the identities of others involved . . . and their connection with other upper echelon gambling personnel" (J.A. II 266-267). The affiant stated that, based on his personal experience in this and other gambling investigations, the information sought through the proposed electronic surveillance would be essential in discovering the full scope of the operation and the identities of all of its personnel, and, in turn, to the successful prosecution of all of those persons

(J.A. II 265-267). See United States v. Bobo, 477 F.2d 374, 933 (4th Cir. 1973), cert. denied, 421 U.S. 902.

In sum, the affidavit disclosed to the issuing judge a total picture of the investigation conducted as of the date of its submission, plus detailed reasons that electronic surveillance would be required for future results. The issuing judge therefore reasonably concluded that conventional investigative techniques would be unlikely to uncover the identities of the lottery's managers and the full extent of the operation, and that further progress on those fronts depended upon the requested authority to conduct electronic surveillance. To hold otherwise in these circumstances would "constitute unwarranted court interference with legitimate investigative discretion contrary to the congressional intent" underlying Section 2518(1)(c). United States v. Robertson, 504 F.2d 289, 293 (5th Cir. 1974), cert. denied, 421 U.S. 913.^{20/}

^{20/} United States v. Kalustian, 529 F.2d 585 (9th Cir. 1975), does not aid DiMatteo's argument, since the affidavit and application for order 309 I made a detailed showing of the extent to which conventional techniques had been unsuccessfully tried and, therefore - as Kalustian requires - a demonstration of the need to conduct electronic surveillance based upon the exigencies of the particular case. However, to the extent that Kalustian can be read to impose a more stringent burden upon the government than that presently imposed in this or other circuits, we submit that Kalustian was wrongly decided and note that it is not uniformly followed even in the Ninth Circuit. See, e.g., United States v. Feldman, 535 F.2d 1175, 1179 (9th Cir. 1976).

3. The government complied with Title III's sealing requirement

Section 2518(8)(a) of Title III requires that the tapes of conversations overheard pursuant to court order be presented to a judge for sealing "[i]mmmediately upon the expiration of the order, or extensions thereof." Appellants contend (Mascitti at 51; DiMatteo at 32; Vigorito at 11) that because of delays in sealing the tapes made in the two series of interceptions, those tapes should have been suppressed. As the district court held, however (J.A. I 115-124), and as we demonstrate, appellants' argument is unpersuasive in the circumstances presented here.

a. The pertinent dates

The first order authorizing seizure of oral communications at Apartment 309 (309 I) issued on December 8, 1972, and expired on December 25, 1972; the taped conversations overheard were sealed on January 16, 1973. The second such order (309 II) issued on January 15, 1973 and expired on February 1, 1973; the tapes were sealed on February 5, 1973. A third order (309 III), authorizing seizure of wire communications from telephones located at Apartment 309 and at 161-20 91st Street in Howard Beach, Queens, issued on February 20, 1973, and expired on March 9, 1973; tapes resulting from that order were sealed on March 16, 1973.

The first order authorizing seizure of oral communications at the Hiway Lounge (Hiway I) issued on April 12, 1973, and expired on April 30, 1973; the resulting tapes were sealed on May 3, 1973. The second such order (Hiway II) issued on May 3,

and expired on May 21, 1973;^{21/} the tapes were sealed on May 24, 1973. A third order (Hiway III) issued on May 24, 1973, and expired on June 16, 1973; none of the conversations seized pursuant to that order were introduced in this prosecution.

b. None of the delays in sealing the tapes warranted suppression

As we have noted, Section 2518(8)(a) requires sealing upon the expiration of an interception order "or extensions thereof". Under the functional test this Court adopted in United States v. Principie, 531 F.2d 1132 (1976), cert. denied Nos. 75-1393 and 1394, February 28, 1977, Orders 309 III and Hiway III were extensions of the earlier orders in their respective series. Moreover, the government satisfactorily explained the delays in securing those extensions, in compliance with United States v. Gigante, 538 F.2d 502, 507-508 n.11 (2nd Cir. 1976). Therefore, since the tapes resulting from earlier orders were sealed before their respective extensions expired, and since the timing of those extensions was proper under the circumstances, the district court correctly refused to suppress those tapes. The court also correctly refused

^{21/} Appellant Vigorito argues (Brief for Vigorito at 5) that the expiration dates of Hiway I and II were, respectively April 27, 1973, and May 18, 1973. However, both orders stated that the authorized interceptions should continue until their purpose as defined by the orders was accomplished or "for a period of fifteen (15) days (excluding Sundays) from the date of this Order, whichever is earlier" (See, e.g., J.A. II 276). Contrary to appellant's contention, "a plain reading of the language" of the orders confirms that each order authorized fifteen days of interceptions, and Sundays were not to be counted for purposes of computing the life of the order. Thus, Hiway I, which was issued on Thursday, April 12, 1973, expired on Monday, April 30, 1973, or fifteen days (excluding three Sundays) from its date of issuance. Likewise, Hiway II issued on Thursday, May 3, 1973, and expired fifteen days later (excluding three Sundays), Monday, May 21, 1973.

to suppress the only other grouping of tapes (those secured under order 309 III) since the seven-day delay in sealing them neither constituted a substantial violation of the statute nor in any way undermined the fundamental purposes it was enacted to serve.

(1) Orders 309 II and III were properly deemed extensions of order 309 I, and orders Hiway II and III were properly deemed extensions of order Hiway I

In United States v. Principie, 531 F.2d 1132 (2nd Cir. 1976), cert. denied, Nos. 75-1393 and 1394, February 28, 1977, this Court formulated a functional definition of the term "extension" as it is used in Title III.^{22/} The Court held that a Title III order should be treated as an extension of an earlier order if the second order "was clearly part of the same investigation of the same individuals conducting the same criminal enterprise" as the first. 531 F.2d at 1142 n. 14. The Court categorically rejected the contention that a brief hiatus between the expiration of one order and the issuance of a second order should preclude a finding that the second was an extension of the first. It further refused to accord dispositive weight to the label attached to a subsequent order by holding that an "extension" order need not be explicitly designated as such.

^{22/} The Court adopted its definition in the course of determining whether the government had fulfilled its obligation under section 2518(8)(d) to serve inventory notice on persons named in a Title III order "not later than ninety days after. . . the termination of the period of an order or extensions thereof." The functional significance of the term "extension" in both the notice and sealing provisions of Title III is precisely the same. In both instances, the government's obligation to perform important statutory duties within a specified period of time is triggered by the expiration of an order "or extensions thereof." Accordingly, the term "extension" should be defined the same way in both provisions.

In light of Principie, the district court was unquestionably correct in its conclusion that orders 309 II and III were extensions of order 309 I and that orders Hiway II and III were extensions of order Hiway I. In both series of orders, the subsequent orders named substantially the same targets and issued upon a showing that those persons were involved in the same gambling operation uncovered by the same investigation as did the first order in the series. Moreover, each series respectively authorized interceptions primarily from a single location. All of the orders in the Hiway series authorized the seizure of oral communications from the Hiway Lounge. In addition, orders Hiway II and III stated on their face that they authorized "continued interception of the oral communications" from the Lounge -- clear evidence that those orders were in the nature of extensions of the first Hiway order.

Likewise, both orders 309 I and 309 II authorized interception of oral communications from Apartment 309; order 309 III authorized interception of wire communications over a telephone located at Apartment 309. That 309 III in addition authorized interceptions over a telephone at another location -- 161-20 91st Street, Howard Beach -- did not convert it into a new order unrelated to its predecessors. See United States v. Principie, supra, 531 F.2d at 1142. On the contrary, the affidavit supporting 309 III clearly disclosed to the issuing judge that the government based its belief that criminal conversations could be overheard on the Howard Beach telephone primarily upon evidence garnered from the earlier interceptions at Apartment 309 and the results of court-authorized pen registers of the telephone at Apartment 309 (G.App.

14-16).

(2) Since order 309 I and II and orders Hiway I and II were extended, and since the tapes secured as a result of those orders were sealed before the extensions expired, the district court properly refused to suppress those tapes

Because the final two orders in each series should be regarded, under the Principle test, as extensions of the first order in the series, the tapes made under the first two orders in each series were not required to be sealed until expiration of the last order in each. The last order in the 309 series -- 309 III -- expired on March 9, 1973. The tapes from orders 309 I and II were thus sealed well in advance of the required date. The last order in the Hiway series -- Hiway III -- expired on June 16, 1973; the tapes from the first two orders in that series had, likewise, been sealed well in advance of that date. Since, as we next argue, there was an adequate explanation for what delay occurred in seeking the extensions, all these tapes were properly sealed as provided for in the statute.

The district court found that the government had satisfactorily explained why it could not obtain the extensions in each series "immediately" upon the expiration of the initial orders and therefore satisfied the requirement of Gigante, supra (J.A. I 121-124):

Special Attorney Barlow, who supervised the investigation for the Strike Force, testified * * * that wherein the 309 I was to expire December 25, 1972, he forwarded the affidavit and application for the 309 II order to Washington for the Department's approval during the last week in December. Due to the delay of the holiday mails, it did not arrive in Washington until January 2, 1973. The Attorney General's approval was not forthcoming until January 12, 1973, a Friday. The government secured Judge

Weinstein's approval at the earliest possible time, i.e. Monday, January 15, 1973. As per Barlow's instructions to have the tapes sealed immediately after an extension order was secured, Agent Parsons had the 309 I tapes sealed the following day, January 16, 1973. A similar scenario developed with respect to the 309 III order; the papers were sent to Washington the last week in January during the term of the 309 II order, arrived there February 1, 1973, but approval did not come for some time resulting in the eventual signing of that order on February 20, 1973. Barlow testified that the delays were unexpected; his previous dealings with Washington found the approval of extension orders to take generally no longer than two to four days.

* * *

Barlow's efforts to be timely were in good faith and his explanation of the delay in securing the 309 II and III orders was satisfactory.

* * *

The issue is less difficult with respect to the Hiway I and II tapes. * * * [T]he government acted with all expeditiousness in securing the extensions. Testimony indicated that the three day delay in presenting the affidavits for Hiway II were again the result of a backup in Washington.

In light of the government's reasonable explanation for the delays it encountered in securing extension orders in each series, Title III's sealing requirement was fully met with respect to all preliminary tapes secured in both.

(3) The seven-day delay between the expiration of order 309 III and the sealing of the 309 III tapes does not require suppression of those tapes.

The only tapes that were not sealed during the pendency of a subsequent extension order were those made pursuant to the last order of the Apartment 309 series -- 309 III. Order 309 III expired on March 9, 1973, and, seven days later, on March 16,

1973, the tapes of the conversations seized under that order were sealed. That brief delay does not warrant suppression of the 309 III tapes under Section 2518(8)(a).

Special Attorney Barlow testified at the pre-trial suppression hearing that he was pre-occupied during the week preceding March 16 with preparations for an upcoming trial in the Eastern District of New York (H. 468). However, he had earlier been assured by the FBI agent in charge of the investigation that all tapes of intercepted conversations were kept locked in a filing cabinet to which the agent alone had access (H. 468-469). On the basis of Barlow's testimony, the district court found that "[t]he sealing one week after the expiration of the subject order was not done with the intent to evade statutory requirements or gain a tactical advantage" (J.A. I 123). We submit that Barlow's explanation of the reason for the brief delay, coupled with the absence of any circumstances suggesting that the delay was improperly motivated or that the responsible government personnel consciously disregarded the sealing provision, suffices to meet the statutory requirement that the government provide a "satisfactory explanation" for the absence of a seal during this period.

In any event, the purposes of the sealing requirement were fully served with respect to the 309 III tapes despite the brief delay. Congress enacted that requirement "to preserve the integrity of the intercepted conversations and to prevent any tampering or editing of the tapes or unlawful use." United States v. Lawson, 545 F.2d 557, 564 (7th Cir. 1975), cert. denied, 424 U.S. 927. See also United States v. Gigante, supra, 538 F.2d at 505; United

States v. Abraham, 541 F.2d 624, 627 (6th Cir. 1976); United States v. Sklaroff, 506 F.2d 837, 840 (5th Cir. 1975), cert. denied, 423 U.S. 874; United States v. Falcone, 505 F.2d 478, 483 (3rd Cir. 1974), cert. denied, 420 U.S. 955. During the pre-trial suppression hearing, FBI Agent Charles Parsons testified that, after each day's interceptions were concluded, the monitoring agents gave him the tapes of the conversations overheard that day. Parsons placed the individual reels into the boxes in which they came from the manufacturer (H. 100-104)^{23/} and locked the boxes in a filing cabinet to which he alone possessed a key (H. 113-114). Parsons further testified that he had exclusive use of the filing cabinet during the period of the interceptions involved in this case (H. 120)^{24/} and that, during his three years as an employee of the FBI, he had never discovered anything missing from the filing cabinet (H. 123). Whenever he received a reel of tape, Parsons filled out a "chain of custody" form documenting that fact (H. 115-116). Duplicates were made of each day's tapes by a clerical employee; Parsons personally supervised the duplication process (H. 116-117). The "chain of custody" forms indicated that no one had checked out any tape after it had been duplicated and then locked in the filing

23/ Contrary to Appellant Vigorito's suggestion (Brief for Vigorito at 13, 20), Title III does not impose a requirement that each reel of tape be individually sealed as soon as it is made.

24/ Parsons entrusted his key to Agent James Mithcell for three or four days in late May 1973 (during the pendency of order Hiway III) while Parsons was away from the office on his honeymoon (H. 104, 114). Although Appellant Vigorito attempts to use this incident to call into question the government's proof of chain-of-custody (see Brief for Vigorito at 20), he fails to add that none of the tapes made under order Hiway III were used as evidence in this case.

cabinet (H. 116). On the basis of Parsons' testimony, the district court made an express factual finding that "[t]he government sustained its burden of showing that the integrity of the tapes was preserved" (J.A. I 123).

The facts of this case are therefore clearly distinguishable from the facts before the Court in United States v. Gigante, supra, upon which appellants primarily rely for their claim that suppression is required. There the Court was confronted with "egregious" sealing delays, ranging from eight and one-half months to more than a year. 538 F.2d at 503-504. The government "provided no explanation whatsoever" for its procrastination and had employed "haphazard procedures" in its handling of the tapes which made it impossible to determine whether the evidence remained intact. Id. at 504-505. Here, by contrast, the delay involved was negligible, only seven days, Special Attorney Barlow candidly explained the reason for the delay, and the government employed careful procedures which, the district court found, insured the integrity of the tapes.^{25/} Gigante thus does not require suppression of the 309 III tapes.

^{25/} Since the date of the interceptions involved in this case, the Department of Justice has instituted a so-called "tickler" system to remind field staff of their responsibilities under Title III upon the termination of an interception. On the date each authorization expires, an attorney in the Special Operations Unit of the Department telephones the supervising attorney in the field to remind him of the expiration and of his duties under the statute, including the immediate sealing requirement (see J.A. II 225). We expect that the "tickler" system will prevent even brief delays of the kind involved in this case.

4. The government's failure to file timely progress reports on every occasion did not require suppression of the evidence gathered through electronic surveillance

Section 2518(6) of Title III provides:

Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

The purpose underlying this provision is to enable the issuing judge to evaluate the continuing need for surveillance through a post hoc review of the fruits of the interceptions thus far conducted. S.Rep. No. 1097, 90th Cong., 2d Sess. 103-104. But by its express terms, the provision is entirely permissive in nature; whether the government is required to submit progress reports is a matter committed by the statute to the discretion of the issuing judge, who may dispense with reports altogether. See United States v. Ianelli, 477 F.2d 999, 1003 (3rd Cir. 1973), aff'd 420 U.S. 770; United States v. LaGorga, 336 F.Supp. 190, 194, amended, 340 F.Supp. 1397 (W.D. Pa. 1971); United States v. Falcone, 364 F.Supp. 877, 888 (D.N.J. 1973), aff'd, 500 F.2d 1401 (3rd Cir. 1974).

The orders in this case called for progress reports to be filed on the fifth and tenth days of the 15-day surveillance period authorized by each order. The reports for order 309 I were filed five days and one day late, respectively. The first report for order 309 II was filed one day in advance of the date

due; a second report and the first report for order 309 III were not filed. The second report under that order was filed two weeks late. The first report for order Hiway I was filed two days late;^{26/} all subsequent reports for orders Hiway I and II were timely filed.

Appellant Mascitti contends (Mascitti at 57) that the government's failure to comply in each instance with the court's order requires suppression of his conversations. While we agree that all of the reports called for by the orders should have been timely filed, we think the suggestion that suppression is required whenever a reviewing court later determines that a report has been filed late fundamentally misperceives the nature and function of Section 2518(6) in the statutory scheme, and should therefore be rejected.

Title III does not require an issuing judge to use progress reports. The reports are a device which the judge may or may not employ to monitor the progress of electronic surveillance. If required at all, they can be reviewed by him at the times and to the extent he believes they will be useful in supervising an on-going investigation. If he becomes dissatisfied with the government's compliance with his order to file reports or with the substance of the reports actually filed, the issuing judge

26/ Appellant Mascitti notes at page 57 of his brief that the first report for order Hiway I was "backdated." Although the cover letter for that report was dated inaccurately, "April 18, 1973," it is clear that no deception was intended or could have occurred. Among the reports submitted with the cover letter dated "April 18, 1973" was the surveillance report for April 19, 1973. Moreover, the cover letter itself contained a postscript: "P.S. These letters confirm my oral report to you at 9:30 a.m., April 19, 1973." (G.App. 73-78)

may take whatever steps may be necessary to remedy that situation, including revocation of the electronic surveillance order. But whether the government's breach of his instructions concerning progress reports warrants some remedial action is a decision which - like the decision to require reports at all - is left to the district judge. It would be inappropriate for a reviewing court to decide that the judge should have been dissatisfied with the government's compliance with a procedure which was designed solely for its usefulness to him at a time now past. See United States v. Scully, 546 F.2d 255, 261 (9th Cir. 1976); United States v. Ianelli, *supra*; United States v. Vento, 533 F.2d 838, 853-854 (3rd Cir. 1976).

In this case, none of the issuing judges ordered discontinuance of the surveillance after the government failed to submit timely progress reports. That they did not reflect their satisfaction with the reports filed, despite the lapses in compliance, and their belief that continued surveillance under the orders was warranted. Accordingly, contrary to appellants' argument, suppression of any of the government's electronic surveillance evidence at this juncture because of the failure to provide timely progress reports would not advance any purpose central to the statute. Suppression on this ground is therefore unwarranted.

5. There is no merit in appellant's claims that the government's asserted failure to comply with Title III's naming requirements warrants suppression

- a. The failure to name appellant Carrara in order Hiway II did not require suppression of any of his conversations.

The Supreme Court's recent decision in United States v. Donovan, No. 75-212, decided January 13, 1977, forecloses appellant Carrara's claim that the district court should have suppressed his conversations seized under order Hiway II because he was not named in that order.^{27/} Although the Court concluded that a Title III application and order "must name an individual if the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation and expects to intercept the individual's conversations" (slip opinion at 13), the Court held that the failure to name such an individual does not require suppression of his conversations, because Congress did not intend the broad identification requirement of Section 2518(1)(b)(iv) "to play 'a central, or even functional role, in guarding against unwarranted use of wiretapping or electronic surveillance.'" Slip Opinion at 22, quoting United States v. Chavez, 416 U.S. 562, 578 (1974). Accordingly, even if there had been probable cause to name Carrara in the Hiway II application and order, the government's failure to name him would not require suppression of any of his conversations.

^{27/} We are unable to locate any place in the record where Carrara raised this claim; accordingly, he should not be permitted to raise it on appeal. United States v. Sisca, 503 F.2d 1337, 1346-1348 (2nd Cir. 1974), cert. denied, 419 U.S. 1008.

In any event, the government was not required under Section 2518(1)(b)(iv) to name Carrara. As Carrara acknowledges (Carrara at 27-28), he was not overheard at any time during the Hiway I interceptions, and he was observed at the Hiway Lounge only once during the pendency of that order. Carrara's single visit to the Lounge was not sufficient to give rise to probable cause to believe that he was a member of the gambling business operating there; a fortiori, the government could not reasonably have predicted at the time that he would be overheard engaging in conversations related to that business during the period covered by Hiway II.^{28/}

^{28/} Appellant DeLuca claims (DeLuca at 10) that his conversations seized pursuant to orders Hiway I and II should have been suppressed because he was not named in either order. Apparently, counsel for appellant DeLuca has not read the orders. Both authorized interception of oral communications of "Michael DeLuca, also known as Mikey, Jr." (J.A. II 275; G.App. 26).

b. Appellant Napoli, Sr. was not entitled to suppression of any of his conversations because of the government's failure to name Appellant Vigorito in its application for order Hiway II.

Appellant Napoli, Sr. contends (Napoli, Sr. at 43) that all of his conversations seized pursuant to order Hiway II should have been suppressed because Special Attorney Barlow "willfully" failed to name Appellant Vigorito in his application for the order, even though Barlow fully expected that Vigorito would be overheard during the order.^{29/} In support of this claim, Napoli, Sr. cites Barlow's testimony that when Vigorito was overheard for the first time on the final day of Hiway I, Barlow decided not to amend his previously-mailed authorization request to include Vigorito because "I knew from past experience that it would have taken another two weeks to get an authorization [from Washington to seek the extension] order if we changed the subjects" (H. 174). Napoli, Sr. argues that Barlow was anxious to secure an extension of the Hiway Lounge interceptions as soon as possible so that a crucial meeting between Napoli, Sr. and his lieutenants scheduled for May 3, 1973 could be overheard. By failing to name Vigorito in the application, Napoli, Sr. argues, Barlow "willfully sought to circumvent [Title III's] naming requirement in order to obtain a tactical advantage over Mr. Napoli" (Napoli, Sr. at 46).

^{29/} Appellant Vigorito raised the failure to name him as grounds for suppressing his conversations below but has not presented that claim here.

Appellant's claim finds little support in the facts and no support in the law. Barlow testified that the determinative factor in his decision not to add Vigorito's name was his expectation that Vigorito would not be overheard (H. 569). Physical surveillance of the Lounge showed that Vigorito served as a "lookout", stationing himself at the front window of the Lounge each day. As the interceptions during Hiway I demonstrate, he almost never ventured away from that post and into the backroom of the Lounge where the listening devices were located. The district court also concluded, in a discussion upon which we rely (J.A. I 104-107), that there was no probable cause to believe that Vigorito would be overheard during Hiway II, and, therefore, that the government was not required to name him.

Even were it otherwise, however, Napoli, Sr.'s claim, like the preceding one, is disposed of by United States v. Donovan, supra. Napoli, Sr. can benefit from the government's failure to name other persons in its application for order Hiway II only if "it can be said that the presence of that information as to additional targets would have precluded judicial authorization of the intercept." United States v. Donovan, supra, slip opinion at 21. Napoli, Sr. is unable to make such a showing.

As required by Title III, order Hiway II issued on the basis of an application and supporting affidavit that contained more than ample information establishing probable cause to believe that Napoli, Sr. and numerous others could be overheard at the Hiway Lounge engaging in crime-related conversations during the period for which the order was sought. Napoli, Sr. does not

argue, and there is nothing in the record to suggest, that the government knowingly failed to identify Vigortio for the purpose of keeping information from the issuing judge that might have prompted him to conclude that probable cause was lacking.

Donovan, supra, slip op. at 21 n.23. In the absence of such a claim, "[t]he failure to identify additional persons who are likely to be overheard engaging in incriminating conversations could hardly invalidate an otherwise lawful judicial authorization."

Id. at 20. Thus, even assuming that the failure to name Vigorito was in violation of Title III's naming requirement, Napoli, Sr. was not entitled to suppression of his conversations on that ground.

c. The misidentification of appellant DiMatteo as "Pasquale Rossetti" in order 309 I did not require suppression of any of his conversations.

1. Appellant DiMatteo contends (DiMatteo at 41) that his conversations seized pursuant to Order 309 I should have been suppressed because he was misidentified in that order as "Pasquale Joseph Rossetti," and because the government knew before that order issued on December 8, 1972, that he was actually the person referred to as "Rossetti". We submit that the factual premise of this claim, if true, would not warrant suppression. In any event, it is not true.

Both Agent Charles Parsons, who swore the affidavit upon which 309 I issued, and Special Attorney Fred Barlow, who supervised the preparation of the application to the district court for the order, testified at the suppression hearing that they did not learn of "Rossetti's" true identity until sometime after December 8 (H. 303-304; 521).^{30/} Once that discovery was made, DiMatteo was accurately identified in all subsequent orders. Moreover, DiMatteo does not argue - and could not - that the misidentification was material to the issuance of the order. The affidavit established probable cause to believe that a person "believed to be Pasquale Joseph Rossetti" was conducting an illegal gambling business and that "Rossetti" would engage in gambling - related conversations at Apartment 309 (J.A. II 240). Whether the affidavit and application identified that person as "Rossetti" "DiMatteo," or "a person unknown," the probable

^{30/} The photographs of Appellant DiMatteo and Pasquale Rossetti (G.Exh. 60; G.A. 79) show a strong resemblance between the two men.

31/

cause to intercept his communications was not diminished. Nor did the misidentification of DiMatteo as "Rossetti" detract from the accuracy of that portion of the affidavit devoted to "a full and complete statement of the facts concerning all previous applications. . . for approval of interceptions of. . . oral communications involving any of the same persons. . . specified in the application. . ." 18 U.S.C. 2518(1)(e). Neither "Rossetti" nor DiMatteo had ever been the subject of any previous application.

2. DiMatteo also argues (DiMatteo at 18) that Special Attorney Barlow violated Title III by permitting the name "Rossetti" to be included in the application, when that name did not appear in the authorization for the order from then Attorney General Richard Kleindeinst. This claim too is meritless. Section 2516(1) of Title III, requiring that the Attorney General or any Assistant Attorney General designated by him give advance authorization for an application for a Title III order, contains no naming requirement, and the authorization

31/ DiMatteo suggested in the district court that the inclusion in the affidavit of information concerning Rossetti's past criminal record enhanced the probable cause as to him. The district court found, however, that "[t]he recitation of the criminal record was mere surplusage. When deleted from the supporting affidavit there remain facts sufficient to support a finding of probable cause" (J.A. I 103). In any event, it is clear that, even if the affidavit and application had made no reference whatsoever to "Rossetti" and his activities, there would still have been probable cause for the issuance of an order to intercept the oral communications of the other named parties at Apartment 309, and monitoring agents would have been permitted to intercept the gambling-related conversations of any other person in the Apartment, including DiMatteo, during execution of the order. Thus the naming (or misnaming) of "Rossetti" and the inclusion of information in the affidavit and application concerning his activities were immaterial to the issuance of the order and to the subsequent lawful interception of DiMatteo's criminal conversations pursuant to the order.

signed by Attorney General Kleindeinst did not purport to limit the persons whose communications could be intercepted to the few names it mentioned. Moreover, the Kleindeinst authorization permitted the Strike Force to apply for an order "authorizing the interception of oral communications. . . at Apartment 309 . . . in connection with the investigation into possible violation of [18 U.S.C. 1955 and 371] by Joseph Mustacchio, Luigi Scafidi. . . [a] male known only as Barry Russo and John Doe D, and others as yet unknown" (Supp. App. to Brief for DiMatteo at 2). Since the request to Kleindeinst referred to DiMatteo as a person "believed to be" Pasquale Rossetti, it was evident that Barlow was unsure of DiMatteo's true identity; it is therefore a fair interpretation of Kleindeinst's authorizing letter that DiMatteo was one of the persons "as yet unknown" to which it referred.

6. The government's failure to serve appellant DiMatteo with timely inventory notice did not require suppression of any of his conversations

On March 22, 1973, and on April 30, 1973, Judge Judd ordered that service of inventories for the entire 309 series be made on June 22, 1973 (Supp. App. to Brief for DiMatteo at 13-14). Service was not accomplished until September 13, 1973, however. On that date, the government provided inventory notice to all appellants, including DiMatteo, with respect to both the 309 and Hiway series of orders.

Appellant DiMatteo's claim that the government's failure to serve him with timely inventory notice requires suppression of his conversations intercepted at Apartment 309 is foreclosed by the Supreme Court's recent decision in United States v. Donovan, supra. There the Court concluded that Congress did not intend "post-intercept notice. . . to serve as an independent restraint on resort to the wiretap procedure." Slip Opinion at 24. Accordingly, it held that the government's failure to comply with the notice procedure is not grounds for suppression under the statute. Id.; see United States v. Giordano, 416 U.S. 505, 527 (1974).^{32/}

^{32/} DiMatteo lamely urges that Donovan is distinguishable, because that case involved a failure to serve persons not identified in the intercept order whereas this case involves a failure to serve timely notice upon persons identified in the orders. But the Court's rationale for refusing to suppress in Donovan -- that Title III's notice provision is not "central" to the overall statutory scheme -- is equally applicable to this case, and, indeed, to all violations of the notice requirement. The Court's suggestion that suppression might be appropriate "if the Government knowingly sought to prevent the District Court from serving inventory notice on particular parties" (slip opinion at 24 n.26) has no application to these facts, and DiMatteo does not suggest otherwise.

Nor can DiMatteo plausibly claim that he was prejudiced by the government's default. Although DiMatteo received inventory notice 89 days later than he should have, he nevertheless received it approximately three years prior to trial, and the government provided him with transcripts of his conversations more than a year and a half prior to trial (J.A. I 127). Since DiMatteo could not have been hindered in the preparation of his trial defense by the late service, there is no basis for suppression. See United States v. Donovan, supra, slip opinion at 24 n.26; United States v. Variano, Nos. 76-1335 et seq., 2nd Cir., decided March 14, 1977, slip opinion at 2306-2307; United States v. Principie, supra, 531 F.2d at 1141-1142.

7. In accordance with orders 309 I and II, electronic surveillance was not conducted at apartment 309 unless one of the named targets was seen entering the premises

The evidence adduced at the suppression hearing refutes Appellant DiMatteo's claim (DiMatteo at 36) that monitoring agents failed to comply with that portion of orders 309 I and 309 II directing that they conduct electronic surveillance at Apartment 309 "only when it has been determined that at least one of the [subjects named in the order] is at the above-described premises."^{33/} Agent Charlie Parsons, who supervised the conduct of the surveillance at Apartment 309, testified at the hearing that, during the period covered by orders 309 I and II, "anywhere from one to six" agents maintained visual surveillance of the building where the apartment was located (H. 315). Parsons explained that "[g]enerally, someone would observe [DiMatteo and Mascitti] going into the apartment house" and that their arrivals and departures "were like clockwork" (H. 237), establishing a pattern that did not vary during the entire period of the order (H. 238). Before the surveillance was instituted, the agents had been informed by building superintendent Kenneth Mars that Mascitti's destination once he entered the building was

^{33/} We are unable to locate any place in the record when DiMatteo raised this claim prior to trial as required for suppression by 18 U.S.C. 2518(10)(a). The record reference cited in his brief at page 37 to document his objection on this ground -- "s.m. 3095" -- is not helpful. There is no page 3095 in the transcript of the suppression hearing. Nor does page 3095 of the trial transcript reveal that any such objection was made, although, of course, an objection at that late juncture would not have been sufficient to preserve the claim for review. Finally, none of the appellants' appendices contain a page "3095".

Apartment 309 (H. 322-325). The agents did not post lookouts in the hallway where Apartment 309 was located, however, because that would have alerted Mascitti and DiMatteo that they were under investigation (H. 325). The agents were thus forced to rely on their observations from the street of appellants' entering the building to determine when to activate the surveillance equipment inside the apartment.

Contrary to appellant DiMatteo's contention, that procedure was entirely reasonable. Based upon what Superintendent Mars had told them, the agents had probable cause at the outset of the surveillance period to believe that, when the two targets entered the building, their destination was the apartment. Each successive day of surveillance confirmed that, whenever appellants were observed entering the building, their conversations were shortly thereafter overheard inside Apartment 309. The agents' dependence on visual surveillance of the building from the street was therefore a reliable method of determining when to begin each day's interception.^{34/}

^{34/} The logs maintained by the monitoring agents (Supp. App. to Brief for DiMatteo at 140-143) also confirm that the agents complied with the order. Many of the logs contain express notations that monitoring was instituted when one of the targets entered the apartment. The logs also show that monitoring promptly ceased whenever the targets left the premises.

II. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE
CONVICTIONS OF APPELLANTS SCAFIDI AND
CARRARA

Only appellants Scafidi and Carrara challenge the sufficiency of the evidence against them (Scafidi at 11; Carrara at 8). Viewed in the light most favorable to the government (Glasser v. United States, 315 U.S. 60, 80 (1942)), the evidence was clearly sufficient as to each.

1. Scafidi. Appellant Scafidi's conviction on the 967 East Second Street count was supported by convincing proof that he was a "runner" for the lottery "bank" uncovered at that address on May 1, 1972. Scafidi was observed entering and leaving the 967 East Second Street residence on numerous occasions during April 1972, usually between 10:30 p.m. and 11:30 p.m., when Voulo, Mustacchio, and Griffin were also there. The frequency and regularity of his arrivals and departures was strong evidence that his role in the operation was to collect the daily "ribbons" prepared at the "bank" for distribution to "controllers" in the field. When FBI agents entered the residence on the night of May 1, 1972, to conduct a search, they interrupted Voulo, Mustacchio, and Griffin as the three were performing their "banking" duties; while the search was in progress, Scafidi arrived on the scene.

Scafidi's claim that his visits to the East Second Street address were wholly innocent in purpose was belied by the evidence of his prior and subsequent involvement in "policy". In June 1971, Scafidi was caught redhanded as he operated a policy "bank" at 405 Elders Lane in Brooklyn. Some of the wagering records seized on that occasion matched records seized from the East

Second Street residence in May 1972. In addition, Scafidi was frequently intercepted over his home telephone during January and February 1973 as he made gambling-related calls to various appellants. In sum, there was ample evidence from which the jury could reasonably conclude that Scafidi was not an innocent guest, but an active participant in the operation of the "bank" at 967 East Second Street and, therefore, in the ongoing policy operation it served during the spring of 1972.^{35/}

2. Carrara. Carrara's conviction on the Hiway Lounge count was likewise supported by clear proof that he was an active participant in the lottery headquartered at the Lounge. On May 4, 1973, Carrara, in a conversation with Napoli, Sr., discussed the fact that he thought he might have a "bad number" that day -- that is, one of his bettors had apparently won. When he expressed some doubt as to whether the day's official number could be accurately derived from "The Post" because "they add the OTB handle into the track and if you add them together its not the right number", Napoli, Sr. advised him, "Don't pay nobody until you get the official number." That conversation clearly implicated Carrara as a "controller" in the Napoli, Sr. operation. On May 16, 1973, Carrara was again overheard talking with Napoli, Sr., this time concerning arrangements to make payments to local police. The inescapable inference to be drawn from Carrara's

^{35/} Scafidi was thus clearly guilty of at least promoting gambling in the second degree as defined by §255.05 of the New York Penal Code. Consequently, there is no merit in Scafidi's claim that the government failed to prove an underlying state law violation as required by 18 U.S.C. 1955.

part in these conversations is that he was a knowing employee in the business. The jury's verdict against him was therefore well-founded.

III. COUNT 4 OF THE INDICTMENT
WAS LEGALLY SUFFICIENT

Appellant Napoli, Sr. contends (Napoli, Sr. at 53) that Count 4 of the superceding indictment, charging him with conducting an illegal gambling business in violation of 18 U.S.C. 1955,^{36/} was defective because it did not specify the type of gambling business he was alleged to have conducted. There is nothing in this claim.

The indictment set forth all of the essential elements of a Section 1955 offense in the language of the statute and included an allegation that appellant had violated specifically-designated provisions of New York's anti-gambling statute. The indictment also specified the dates during which appellant's violation occurred. This Court has "consistently sustained indictments which tracked the language of the statute and, in addition, do little more than state time and place in approximate terms." United States v. Salazar, 485 F.2d 1272, 1277 (2nd Cir. 1973), cert. denied, 415 U.S. 985; see also United States v. Bernstein, 533 F.2d 775, 786-787 (2nd Cir. 1976), cert. denied, No. 75-1798, December 6, 1976, and cases cited therein. This count of the indictment more than satisfied those pleading standards.

Napoli, Sr. cannot seriously claim that he did not receive adequate notice of the specific type of illegal gambling activity with which he was charged. In a bill of particulars provided to

^{36/} Count 4 is quoted at page 53 of Napoli, Sr.'s brief and appears at page 22 of Appellants' Joint Appendix.

him several months prior to trial, the government informed him that it would attempt to prove his involvement in a "policy" or "numbers" operation, in violation of two cited provisions of New York law (G.App. 68).^{37/} The information contained in the indictment and bill of particulars was therefore clearly sufficient to apprise the defendant of the nature of the charges against him and, together with the record of the trial proceedings, will enable him successfully to plead former jeopardy to any future prosecution for the same offense. Russell v. United States, 369 U.S. 749, 764-766 (1962).

^{37/} At the time of the bill of particulars, this count of indictment was designated as count 5 (G.App. 57, 68).

IV. APPELLANTS WERE NOT PREJUDICED BY THEIR JOINT TRIAL

1. The indictment charged appellants and numerous others not only with substantive gambling offenses, but with conspiracy to commit those offenses, in violation of 18 U.S.C. 371. It was the theory of the conspiracy count that appellant Napoli, Sr. was the central figure in a numbers empire consisting of three "Legs": one involving a numbers lottery in Brooklyn and proved by the evidence adduced on the Counts concerning 967 East Second Street, Apartment 309, and the Hiway Lounge; a second involving similar activity in Yonkers, New York; and a third involving a lottery business in New Jersey. At the conclusion of the government's case-in-chief, the court ruled that the evidence adduced on the New Jersey "Leg" showed that Napoli, Sr.'s role in that operation was substantively different, reflecting a different criminal agreement, than his role as manager and financier of the Brooklyn operations as shown by the overwhelming evidence adduced on that "Leg". The court concluded that the government had proven at least two separate conspiracies, neither one of which was the conspiracy charged, and, accordingly, ordered the conspiracy count dismissed as to all appellants.

2. Appellants contend (Napoli, Jr. at 14; Mascitti at 64; Vigorito at 22; Voulo at 9; DeLuca at 3; Carrara at 32) that, once the conspiracy count was dismissed, the remaining substantive counts were improperly joined and the trial court was required to sever those counts for a separate trial of each. This claim is unpersuasive.

It is settled that "[o]nce defendants have been properly joined under Fed.R.Crim.P. (8)(b), dismissal of the count justifying joinder will require severance of the remaining counts only if the defendant will be prejudiced by the joinder or if the count dismissed was not alleged by the government in good faith, i.e., with reasonable expectation that sufficient proof will be forthcoming at trial." United States v. Ong, 541 F.2d 331, 337 (2nd Cir. 1976), cert. denied sub nom. Young v. United States, No. 75-1055, March 21, 1977; United States v. Aiken, 373 F.2d 294, 299 (2nd Cir. 1967), cert. denied, 389 U.S. 833; United States v. Variano, Nos. 76-1335 et seq., slip opinion at 2302-2303 (2nd Cir. decided March 14, 1977). Moreover, "[i]n the absence of proof that the government's theory was frivolous or clearly rejected by recent precedent of which it was or should have been aware," there can be no finding that the count dismissed at mid-trial was alleged in bad faith. United States v. Ong, supra, 541 F.2d at 338.

The theory underlying the conspiracy count was not frivolous nor had it been foreclosed by prior authority of this Court. On the contrary, the government attempted to show a massive conspiracy operated by a common management team headed by Napoli, Sr. and consisting of interrelated numbers games based in and around New York City. The trial judge recognized that the government had adduced overwhelming proof of Napoli, Sr.'s direction of the Brooklyn "Leg" and substantial evidence concerning his involvement in a New Jersey "Leg" as well. The trial judge's decision to dismiss the conspiracy count was based on the view that Napoli, Sr.'s

role in the New Jersey operation as shown by his conversations at the Hiway Lounge was substantially different from the role he played in the Brooklyn numbers and that the evidence relating to the New Jersey "Leg" thus reflected the existence of a criminal enterprise distinct from that which was operating the numbers in Brooklyn. In ordering dismissal, however, the trial court did not suggest that the government's contrary view of the evidence, still firmly held at that point, was frivolous. Accordingly, there is no merit in appellants' claim that the conspiracy count ultimately rejected by the trial judge was alleged in bad faith.^{38/}

Nor were appellants prejudiced by the submission to the jury of the three substantive Brooklyn counts in which they were variously named. The court explicitly instructed the jury to disregard the evidence adduced on the conspiracy count (T. 5747-5749, 5799-5805, 5815) and emphasized that each defendant's guilt or innocence on each count must be judged solely on the basis of his own actions and words during the time frame covered by that count (T. 6765-6767). Moreover, the evidence of each of these appellants' guilt on the substantive counts of which

^{38/} Contrary to Napoli, Jr.'s suggestion (Napoli, Jr. at 5) the government's expert witness, Richard Harker, did not testify that he believed the wagering records introduced on the "Yonkers Leg" reflected an entirely separate operation from that disclosed by the records introduced on the "Brooklyn Leg". On the contrary, Harker testified that there were striking similarities between what the two sets of records revealed, most notably that both "Legs" apparently used "carbon" ribbons, a procedure that he had never before encountered in his investigations of New York area numbers games (See T. 5228-5234).

they were convicted was so overwhelming that no reasonable jury at a severed trial could have reached a different verdict than the verdict issued by the jury in this case. Appellants Napoli, Sr., Napoli, Jr., Vigorito, DiMatteo, Mascitti, Carrara and DeLuca, all of whom were found guilty on the Hiway Lounge count, "literally convicted themselves out of their own mouths". United States v. Ong, supra, 541 F.2d at 338. (See T. 5297-5309, 5463-5464; 5479-5517; 3936-3944 G.Exh. 273-A; G.Exh. 275-A). Likewise, as we have shown, the involvement of appellants Scafidi and Voulo in the 967 East Second Street policy bank during the Spring of 1972 was clear and unmistakable. Accordingly, appellants' claim that the trial court's refusal to grant their severance motions warrants reversal of their convictions should be rejected by this Court. Chapman v. California, 386 U.S. 18 (1967).

V. THE TRIAL COURT'S DECISION TO EXCUSE A
TARDY JUROR AND TO SUBSTITUTE AN ALTER-
NATE JUROR IN HIS PLACE WAS NOT AN ABUSE
OF DISCRETION

On the twenty-second day of trial, proceedings commenced promptly at 10 a.m. with a bench conference in the jury's absence concerning evidentiary matters (T. 4550). Near the conclusion of the conference, which to that point had consumed approximately 16 pages of the transcript, the clerk informed the trial judge that Juror #3 "again has failed to show" (T. 4566; J.A. II 181). The trial judge proposed that the tardy juror be excused and an alternate be substituted in his place. He further observed that "this is the second time [Juror #3] has been late" (Tr. 4568; J.A. II 183). At the court's direction, the clerk telephoned the tardy juror's home, and the clerk was told that the juror had departed approximately 15 minutes prior to the call (T. 4569; J.A. II 184). Noting that "we might have to wait until 10:30" and that "court time is too valuable" (T. 4569-4570; J.A. II 184-185), the trial judge called the jury into the courtroom and directed the first alternate juror to replace Juror #3. Counsel for all appellants objected to the substitution (Tr. 4570; J.A. II 185).

Immediately thereafter, FBI agent Robert Liesegang was called to the witness stand and began playing a tape of a conversation overheard during the electronic surveillance of the Hiway Lounge (T. 4571). "[T]wo or three minutes" after Liesegang had begun his presentation, Juror #3 arrived at the courtroom, and defense counsel immediately requested that he be permitted to resume his seat on the jury and that Agent Liesen-

gang be directed to begin again (T. 4572; J.A. II 186). The government did not oppose the request. The request was denied (Id.).

Appellants contend (Carrara at 24) that the trial judge's decision to excuse the tardy juror and to substitute an alternate in his place without the consent of defense counsel was an abuse of discretion and constituted reversible error. But "[t]he substitution of an alternate for a juror for reasonable cause is within the prerogative of the trial court and does not require the consent of any party." United States v. Ellenbogen, 365 F.2d 982, 989 (2nd Cir. 1966), cert. denied, 386 U.S. 923; Fed. R.Crim.P. 24(c).^{39/} Indeed, the court may remove a juror and replace him with an alternate whenever he is convinced that the juror's ability to perform his duty is impaired. United States v. Cameron, 464 F.2d 333 (3rd Cir. 1972). Moreover, "[a] party claiming to be injured by such action is entitled to a new trial only on a clear showing of prejudice to him." Id. See also United States v. Floyd, 496 F.2d 982, 989-990 (2nd Cir. 1974), cert. denied, 419 U.S. 1069; United States v. Jones, 534 F.2d

^{39/} United States v. Baccari, 489 F.2d 274 (10th Cir. 1973), cert. denied, 417 U.S. 914, on which appellants rely (Carrara at 25) for the proposition that substitution of jurors without the defendant's consent is always improper and warrants reversal, is distinguishable. In Baccari, an alternate juror was recalled and substituted for a hospitalized regular juror, after the jury had commenced its deliberations, and the alternate had been discharged from the case as required by Rule 24(c). The court found that the defendant's acquiescence in the substitution served to waive any objection he might have had to the procedure, but noted in dictum that the substitution would have been grounds for a new trial if the defendant had not consented. The court's dictum has no application to the facts of this case, where the substitution was made during the course of trial and in accordance with Rule 24(c).

1344, 1346 (9th Cir. 1976), cert. denied, No. 75-6699,
October 4, 1976.

Appellants do not specify how they could have been prejudiced by the substitution. Thus, even if the trial court's ruling were unreasonable, there would be no basis for granting appellants a new trial. In any event, the trial court's decision to dismiss the tardy juror was for reasonable cause. Juror #3 was already several minutes late when his absence was first reported to the court, and the court did not decide to make a substitution until after it had telephoned the tardy juror's home to ascertain the reason for his absence and had concluded on the basis of that call that the juror was unlikely to arrive for several more minutes. The trial to that point had consumed approximately one month of the court's time and was likely to last several more weeks. Moreover, Juror #3 had been late before and, ^{40/} apparently, had only barely arrived on time on other occasions. There was thus every reason to believe that, if he were not removed from the panel, Juror #3 would persist in his tardiness and that the already lengthy trial would be made even longer as a result of such unnecessary interruptions. In these circumstances, the trial court had good cause to dismiss the tardy juror. See United States v. Domenech, 476 F.2d 1229, 1232 (2nd Cir. 1973), cert. denied, 424 U.S. 840. ^{41/}

^{40/} The trial judge identified Juror #3 as "the man that comes in sometimes out of breath" (T. 4568; J.A. II 183).

^{41/} Contrary to appellants' assertion, the fact that Juror #3 arrived shortly after the trial judge decided to order the substitution is irrelevant to the determination whether that decision was reasonable. At the time he ordered the substitution, the trial judge could not foresee when the tardy juror might arrive, and the only information available to the court on that score suggested that the trial would have to be delayed for some time before the juror could be expected to appear.

V₄. APPELLANT CARRARA'S REMAINING
CLAIMS ARE WITHOUT MERIT

1. Carrara's "construction worker" defense

Appellant Carrara proposed to explain his presence at the Hiway Lounge in April and May 1973 by claiming that he was a member of a construction crew that was working during that period in the building where the Lounge is located. Specifically, Carrara proposed to call the contractor in charge of the construction, Anthony Mercogliano, to testify as to Carrara's role in the construction work. Before calling Mercogliano, however, Carrara asked the court to rule in advance that the government would not be permitted to cross-examine Mercogliano concerning his association and ties with Napoli, Sr. and the other defendants. The court refused the request, and Carrara decided not to call Mercogliano (T. 5794-595).

Carrara renews here his claim (Carrara at 5, 16) that the trial court erred in refusing to limit prospectively the government's cross-examination of Mercogliano. This claim is frivolous. If Mercogliano had been called to testify, counsel for Carrara would have had ample opportunity to object to the government's cross-examination of the witness whenever there was occasion to do so. But he was not entitled to a ruling in advance even of direct questioning that would bar the government from pursuing any particular line of cross-examination. In any event, the government would have been entitled to probe Mercogliano's possible bias by questioning him concerning his relationship with Napoli, Sr. and the other defendants. An objection to that line of

cross-examination would properly have been overruled.

In a related claim (Carrara at 2, 15), Carrara urges that the trial court erroneously refused to receive into evidence City Building Department records documenting the construction activity at the Lounge. However, Carrara fails to mention in his brief that he withdrew his offer of the records after the government agreed to stipulate that construction was ongoing at the Lounge until May 7, 1973 (T. 5798-5799). That Carrara is now dissatisfied with the stipulation he entered at trial is not the basis for a valid claim of error.

2. The manner of presenting tape-recorded evidence to the jury

Appellant Carrara's contention (Carrara at 8, 26) that it was error to distribute transcripts to the jurors to assist them as they listened to the tapes is without merit. So long as the jury is properly instructed, as it was here (T. 2643, 2646, 2827), that the transcripts are only aids and that the only evidence which may be considered is what is heard on the tapes, the use of transcripts is proper. United States v. Chiarizio, 525 F.2d 289, 293-294 (2nd Cir. 1975); United States v. Bryant, 480 F.2d 785, 791 (2nd Cir. 1973); United States v. Carson, 464 F.2d 424, 437 (2nd Cir. 1972), cert. denied, 409 U.S. 949; United States v. Koska, 443 F.2d 1167, 1169 (2nd Cir. 1971), cert. denied, 404 U.S. 852.^{42/}

^{42/} Appellant Carrara does not challenge the accuracy of the transcripts. None of the defendants in this case offered their own version of any of the transcripts, and there was no objection to the accuracy of any of the government's transcripts prior to trial (See T. 2831-2333). All defense counsel were provided with copies of the government's transcripts more than a year before the trial (Id.).

Nor was there any error in the manner in which the government's witnesses proffered their opinions as to the identities of the speakers on the tapes. Because defense counsel refused to stipulate to voice identification, the government was forced to offer opinion evidence as to the identity of each speaker in each conversation on each tape. Thus, after each tape was played to the jury, it was replayed in small excerpts, and the identifying witness was permitted to tell the jury what he had heard and his opinion as to the speaker. There can be no valid claim that the repetition of the playing of the tapes was prejudicial. Given a second chance to listen to the tapes, the jury was less likely to rely on the transcripts and more likely to rely on what they had heard from the tapes themselves.

3. Limitation of defense counsel's closing argument

Appellant Carrara urges (Carrara at 4, 23) that the trial court improperly refused to permit defense counsel to comment during closing argument on the government's failure to prove certain facts alleged in its Bill of Particulars. The claim answers itself. Counsel must limit their arguments to the evidence actually admitted at trial and to reasonable inferences therefrom. United States v. Bell, 506 F.2d 207, 225-226 (D.C. Cir. 1975); United States v. Terrell, 474 F.2d 872, 876-877 (2nd Cir. 1973); United States v. Spangelet, 258 F.2d 338, 342 (2nd Cir. 1958). The government's Bill of Particulars was not evidence in the case and the government was not required to offer proof as to every item set forth in the Bill. Thus, any reference to the Bill would have been improper.

4. Prosecutor's characterization of Carrara as a "payoff man" during rebuttal summation

Finally, appellant Carrara contends (Carrara at 5, 18) that the prosecutor improperly referred to him as a "payoff man" during rebuttal summation. However, counsel for Carrara did not object to the remark when it was made (see T. 6697-6698),^{43/} and, thus, the prosecutor's argument may be reviewed by this Court only for plain error. F.R.Crim.P. 52(b); United States v. Caniff, 521 F.2d 565, 572 (2nd Cir. 1975), cert. denied sub nom. Benigno v. United States, 423 U.S. 1059; United States v. Briggs, 457 F.2d 908 (2nd Cir. 1972), cert. denied, 409 U.S. 986. There was no error. The prosecutor was referring to conversations between Carrara, Vigorito, and Napoli, Sr. at the Hiway Lounge on May 15 and 16, 1973, during which the three men apparently discussed arrangements for making protection payments to local police (T. 6697-6698). The characterization of Carrara as a "payoff man" in the Napoli gambling operation was therefore fair since it was based upon evidence before the jury indicating precisely that fact.

^{43/} The objection quoted by Carrara on page 20 of his brief came five days after closing argument and long after the jury had commenced its deliberations (T. 6942-6943).

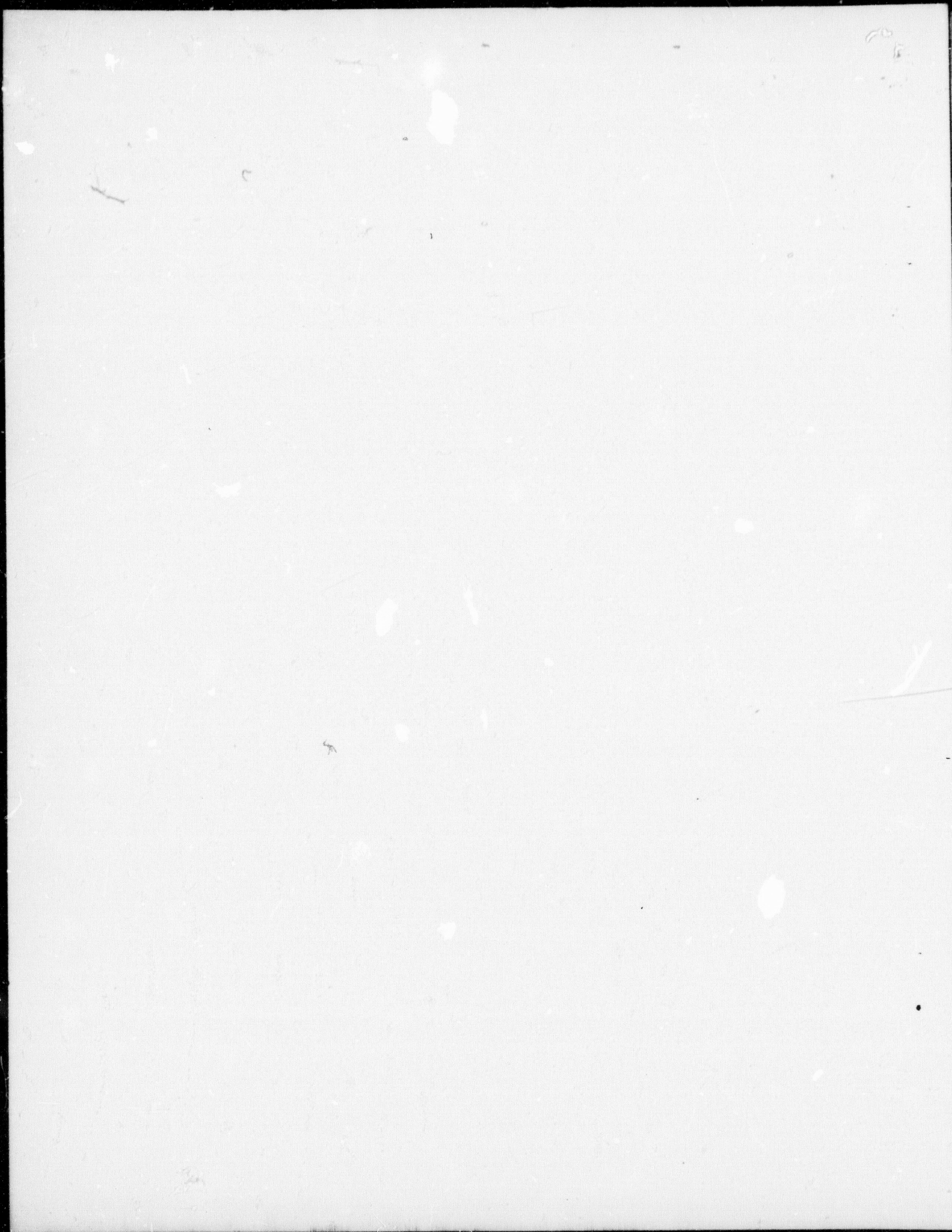
CONCLUSION

For the foregoing reasons, the convictions should be affirmed.

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